## AGENDA

## SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

## Room WW54 Monday, January 17, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
INTRODUCTIONS	Introduction of Committee Members	
	Introduction of Senate Page Aurelia Anderson, Rigby, Idaho	
GUBERNATORIAL APPOINTMENT:	Committee Consideration of the Gubernatorial Appointment of Nancy A. Baskin to the Idaho Judicial Council to Complete Judge Brudie's term expiring on June 30, 2025.	Nancy A. Baskin, District Judge of the Fourth Judicial District in Ada County
<b>RULES REVIEW</b>	Overview of Upcoming Rules Review	

COMMITTEE MEMBERS

Chairman Lakey Sen Thayn
Vice Chairman Ricks Sen Zito
Sen Lodge Sen Burgoyne
Sen Lee Sen Wintrow

**COMMITTEE SECRETARY** 

Sharon Pennington

Room: WW48 Phone: 332-1317

Email: sjud@senate.idaho.gov

Sen Anthon

### MINUTES

## **SENATE JUDICIARY & RULES COMMITTEE**

DATE: Monday, January 17, 2022

TIME: 1:30 P.M.

PLACE: Room WW54

**MEMBERS** Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Lee, Thayn, Zito,

PRESENT: Burgoyne, and Wintrow

Senator Anthon ABSENT/

**EXCUSED:** 

NOTE: The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

Chairman Lakey called the meeting of the Senate Judiciary and Rules CONVENED:

Committee (Committee) to order at 1:32 p.m.

INTRODUCTION: Chairman Lakey welcomed Aurelia Anderson as page for the Committee and

asked her to tell the Committee about herself. She said she liked to longboard and refinish furniture. Aurelia is from Rigby, Idaho, and wants to become a forensic psychologist. Chairman Lakey asked Aurelia how she became interested in the page program. She responded that she spent a week at the Capitol last year watching the session and decided it would be fun and interesting

to have this opportunity.

APPOINTMENT **HEARING:** 

GUBERNATORIAL Committee Consideration of the Idaho Judicial Council Appointment of Nancy A. Baskin to the Idaho Judicial Council to complete Judge Brudie's term expiring on June 30, 2025. Nancy A. Baskin, Boise, Idaho,

gave a brief overview of her 30 years of experience practicing law. She stated she understands the value of having the most qualified candidates to sit as judges. She feels her service in this position is a way to give back and serve the community. Judge Baskin explained to the Committee that she has had experiences with all types of people and cases. She has handled litigation from contract disputes to a death penalty case. Her decisions, as a judge, are based on applying the law as she interprets it. Judge Baskin stated she was committed to allocating the time required for this position and she has a sincere interest in getting the best candidates as positions open. She is familiar with the demands placed on judges and recognizes the importance of judges being respectful to

everyone in the court room.

RULES REVIEW: Overview of Upcoming Rules Review. Vice Chairman Ricks stated there were

> some rules from the Public Defense Commission that were carry overs from last year. He indicated that Executive Director Elliott would contact Committee

members to discuss her position on those rules.

INTRODUCTION: Chairman Lakey introduced Judge Juneal Kerrick, and said she will be taking

> the position held by Judge Barry Wood in working with the Legislature. Judge Kerrick stated she had been a judge for 30 years and an educator in the Judicial Courts. She indicated that she was honored to serve in her current capacity, to

have had her career, and now the opportunity to give back.

ADJOURNED: Chairman Lakey adjourned the meeting at 2:03 p.m.

Senator Lakey	Sharon Pennington
Chair	Secretary

## **AGENDA**

## SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

## Room WW54

Wednesday, January 19, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
GUBERNATORIAL APPOINTMENT VOTE:	Vote on the Appointment of Nancy A. Baskin to the Idaho Judicial Council to Complete Judge Brudie's term expiring June 30, 2025	
PRESENTATION	Office of the State Appellate Public Defender & Idaho Criminal Justice Division - 2022 Update	Eric Fredericksen, Director, Idaho State Appellate Public Defender
PRESENTATION	The Impact of Illicit Drugs on Idaho Communities by Medical and Law Enforcement Professionals	Dr. Matthew Cox, Medical Director, St. Luke's Children at Risk Evaluation Services (CARES)
PRESENTATION	Continued - The Impact of Illicit Drugs	Joe Andreoli, Sergeant, Boise Police Department
PRESENTATION	Continued - The Impact of Illicit Drugs	Gary Dawson, PHD Pharmacologist and Ada County Deputy Sheriff

Public Testimony Will Be Taken by Registering Through the Following Link:
Registry to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERS COMMITTEE SECRETARY

Chairman LakeySen ThaynSharon PenningtonVice Chairman RicksSen ZitoRoom: WW48Sen LodgeSen BurgoynePhone: 332-1317

Sen Lee Sen Wintrow Email: sjud@senate.idaho.gov

Sen Anthon

### MINUTES

## **SENATE JUDICIARY & RULES COMMITTEE**

DATE: Wednesday, January 19, 2022

TIME: 1:30 P.M.

PLACE: Room WW54

**MEMBERS** Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Anthon, Thayn, Zito,

Burgoyne, and Wintrow PRESENT:

Senator Lee ABSENT/

**EXCUSED:** 

NOTE: The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

Chairman Lakey called the meeting of the Senate Judiciary and Rules Committee CONVENED:

(Committee) to order at 1:30 p.m.

INTRODUCTION: **Chairman Lakey** asked Senator Anthon to introduce his legislative extern.

> Senator Anthon introduced Josh Scholer and stated that Josh is in his third year of law school. He indicated that Josh would be available to do legal research and

help both the majority and minority Senate members.

Senator Anthon introduced Bruce Hossfeld, the mayor of Paul, Idaho in

attendance.

**VOTE ON** APPOINTMENT:

**Senator Burgoyne** moved to send the Gubernatorial Appointment of Nancy A. GUBERNATORIAL Baskin to the Idaho Judicial Council to complete Judge Brudie's term expiring June 30, 2025 to the floor with a recommendation that she be confirmed by the Senate. **Senator Lodge** seconded the motion. The motion carried by **voice vote**.

PRESENTATION: Office of the State Appellate Public Defender & Idaho Criminal Justice Division 2022 Update. Eric Frederickson, Director, included a power point presentation which identifies the organization and programs relating to his department (see Attachment 1).

> Senator Burgoyne questioned the reasons why a death penalty case, from the time of sentencing to an execution, takes so long. Director Fredericksen responded that the post-conviction process can take a long time due to several factors. Discovery disputes can cause additional litigation, issues may be raised later that require reevaluation and relitigating, and some times cases get to the federal court and then are sent back to the state court to be retried. Chairman Lakey asked for additional information on the post-conviction process, and a rough percentage of cases remanded pursuant to post-conviction. Director Fredericksen stated there will always be a petition for post-conviction relief in capital cases where there is an affirmative waiver by the client. Criminal cases have a small percentage who petition for post-conviction relief. They usually see 100-150 cases a year. Discretionary felony and misdemeanor cases usually do not make it to the appellate courts.

PRESENTATION: Eric Frederickson, Chair. Chair Frederickson explained that the Commission was started in 2005 by Governor Dirk Kempthorne. The goal was to get all of the entities and individuals who deal with criminal issues together and evaluate current concerns and cost effective solutions for those concerns. Chair Frederickson presented 2022 goals and objectives for the Commission (see Attachment 2).

Senator Lodge asked how many different groups were currently represented by the Criminal Justice Commission. Chair Fredricksen estimated there were 28 or 29. Recently the U.S. Attorney's Office and a Hispanic group were added. In light of the difficulty in participation from the tribe or the underrepresented, the citizen numbers in those areas were increased from 2 to 3 citizens. Senator Burgoyne complimented the Commission on the outstanding work they do. He stated that the people who are working on these issues are working on them in good faith and overcoming institutional differences to come up with workable solutions that make improvements possible.

PRESENTATION: The Impact of Illicit Drugs on Idaho Communities. Dr. Matthew Cox, Medical Director, St. Luke's Children at Risk Evaluation Services (CARES), stated that he is a child abuse pediatrician, serves as a newborn pediatrician in Meridian, and works with hospitalized children at St. Luke's in Boise. Dr. Cox explained the toxic effects of illicit drug use by parents on their children. It is estimated that one in twenty children in utero are exposed to illicit drugs and one in nine are exposed to alcohol in utero. Evidence has shown that both of these substances can have long term detrimental effects on children's physical and emotional well-being and development. Complications include: prematurity, raising the risk of long term medical complications due to early birth and, low birth weight in utero exposure resulting in small babies who are more vulnerable. Children who have been exposed to narcotics or opiates often have neonatal abstinence or withdrawal symptoms. Children who have been exposed to prescription medications that are heavily used, may have neurobehavioral symptoms as newborns and may experience being jittery, seizures, have feeding difficulties or GI problems. These children may be challenging to take care of. If a difficult child is born into a vulnerable, unstable family, there is potential for negative effects. Toxic environments can lead to direct toxic effects or intoxication. The negative effects of parental substance abuse on children can affect them directly. The general care of children who are vulnerable and dependent on someone who has suffered from their own substance abuse puts the children at additional risk.

### **DISCUSSION:**

Chairman Lakey questioned if children could become affected by the drugs just by touch rather than ingesting. Dr. Cox stated that if a drug is being smoked and the children come in contact with the affected surfaces, and touch them or put them in their mouths, it can lead to long term exposure. The most extreme situation is when they have become actively intoxicated. Senator Wintrow asked what recommendation he would give to the Legislature to protect Idaho's children. **Dr.** Cox responded that educating the public is important. It is necessary to identify and define the toxic environments as a form of child abuse. It would be helpful to make this type of distinction and get it incorporated in child protection laws so that the public can act in protecting the affected children.

Senator Lodge inquired what types of behavior have been seen later on in children who have been in unsafe environments. Dr. Cox explained that studies have shown a high association with issues in their physical and mental health into adulthood. Identifying and recognizing these experiences as toxic stressors and intervening before the stress changes the structure of their brain is vital. Appropriate early intervention is the way to minimize the long term effects. **Dr.** Cox commented that it requires a collaboration of all the different agencies involved working together for the betterment of Idaho's children.

Chairman Lakey asked Dr. Cox to comment on the challenges surrounding the use of fentanyl around children. Dr. Cox stated that fentanyl is so potent it can quickly cause respiratory arrest. It can be lethal to a child when it is used topically on an adult and the child touches it. The substance is readily available to parents and some times they don't even realize how potentially lethal fentanyl is.

**Chairman Lakey** stated that due to illness Joe Andreoli would be unable to present.

### PRESENTATION:

The Impact of Illicit Drugs on Idaho Communities. Gary Dawson, PHD Pharmacologist and Ada County Deputy Sheriff, stated that he has an understanding of the difficulties in the trials and tribulations associated with drug and alcohol rehabilitation. Fentanyl presents challenges because of its potency and rapid effects. If it isn't recognized quickly, it can be a cause of death. Narcam became more popular as fentanyl usage increased. Users of fentanyl should have narcam in their homes to help prevent unnecessary deaths. Fentanyl was used for chronic pain especially in cancer patients. The supervised use of fentanyl is not the problem. Fentanyl being sold or mixed with other drugs has increased dramatically in the last year. Counterfeiters are capable of making fentanyl look like other drugs and the purchasers are unaware that fentanyl is in the drug being purchased. It is easy to overdose on fentanyl and many laboratories are not interested in the amount being added in with other drugs. It doesn't require much illegal fentanyl to make a big difference and laboratories are able to make big profits at a serious risk to communities. Another serious issue is the increase in overdose deaths. Because a small amount can cause so much harm, the effects are being felt in the health care system. Increases in ER visits, hospitalizations, and traffic accidents due to people driving under the influence of the drug or drugs laced with fentanyl, are putting increased pressure on the medical profession. The derivatives of fentanyl are readily available and easily manufactured (see Attachment 3).

### DISCUSSION:

**Senator Burgoyne** questioned if fentanyl does more harm than good? **Dr. Dawson** responded that in the hands of well trained practitioners, the drug is almost a miracle and can give relief to so many pain sufferers. On the other side, if one isn't careful with it's usage, it can get out of hand very quickly. **Chairman Lakey** asked if there was anything the Legislature could do to help keep fentanyl from being used unwisely. **Dr. Fox** stated there is no single answer, and it would require many pieces working together to solve the challenges with fentanyl. He stated that possibly earlier education about the dangers involved with drug use, training on dealing with mental health issues relating to addiction, enforcement of its use and post care treatment and follow-up would all be important steps to take.

### **ADJOURNED:**

There being no further business, **Chairman Lakey** adjourned the meeting at 3:00 p.m.

Senator Lakey	Sharon Pennington	
Chair	Secretary	

## The State Appellate Public Defender Office of

I.C. § 19-868: Statement of Legislative Intent in appeal "is an extraordinary burden on the representation for indigent defendants on creating the SAPD: The cost of legal counties....

- ▶ to reduce that burden
- to provide competent counsel
- avoid paying high hourly rates to independent counsel

# Capital Crimes Defense Fund

- Created in 1998 by I.C.§19-863A
- CCDF acts like an insurance program
- Counties pay an annual premium based upon population
- The counties pay a \$10K deductible per case,
   Then the fund covers the additional defense costs

- As of December 2016, all 44 counties participate
- CCDF is managed by a 7
  member Board of Directors
  elected by the counties
- Counties that participate in the fund also receive the services of the SAPD as defined in 1.C.§ 19-868, et.

# The Right To Counsel

The right to effective assistance of counsel conviction is guaranteed by the United in an appeal of right from a felony States and Idaho Constitutions.

discretionary in felony cases and mandatory action is provided by Idaho statute and is The right to counsel in a post-conviction in capital cases.

# SAPD Staff

## Administrative

▶ Eric D. Fredericksen, State Appellate Public Defender, 1 office administrator, 1 part-time runner

# ▼ Capital Litigation Unit

▶ 2 lead attorneys (1 is Chief of CLU), 1 staff attorney, 1 mitigation specialist, 1 investigator, 1 support staff

## Appellate Unit

1 Chief of AU, 12 staff attorneys, 3 support staff, 1 receptionist

Total: 25 Full-Time Employees, 1 Part-Time Employee

# Appellate Unit Case Types

## Direct Appeals

- An appeal from the felony conviction itself or grant of motion in a felony, misdemeanor (2020), and juvenile (2020) case on appeal by the State of Idaho
- Review of what occurred in court, on the record
- Reviewing whether the district court did its job consistently with the law
- Review of some unpreserved Constitutional violations

# Habeas Corpus Appeals

- Generally limited to claims regarding conditions of confinement
- Some claims regarding parole processes

- Post-Conviction Appeals 1.C. §19-4901, et. seq.
- Civil Action in which the former defendant sues the State asserting specific errors
- Allows the petitioner to provide evidence of things that occurred out of court and off the record
- Proper vehicle to raise claims of Ineffective Assistance of Counsel

# Caseload vs. Workload Appellate Unit

- ► Caseload measures the number of cases opened by the SAPD within a given fiscal year. The opened date is the date the Notice of Appeal is filed.
- Workload measures
   the average
   weighted value of
   case work handled
   by an Appellate Unit
   attorney.

- ► FY2018: 604
- FY2019: 600
- ► FY2020: 618
- ► FY2021: 435

- ► FY2018: 53.30
- FY2019: 51.81
- ► FY2020: 58.08
- ► FY2021: 43.30

# Capital Unit Case Types

- Post-ConvictionProceedings in DistrictCourt
- ► Filing of Petition for Relief
- **▶** Investigation
- Summary Dismissal Proceedings
- ► Evidentiary Hearings

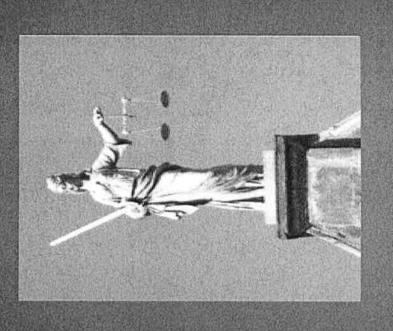
- Consolidated Appeal
- ▶ Includes both the Direct Appeal and the Post-Conviction Appeal
- Interlocutory Appeals in Post-Conviction

# Active Death Penalty Litigation - Idaho

- SAPD has 3 active cases in its Capital Litigation
- Timothy Dunlap Recent Idaho Supreme Court Opinion affirming the denial of Post Conviction
- Erick Virgil Hall (Hall II) Denial of Post-Conviction Relief by the district court, on reconsideration.
- Jonathan David Renfro Death Verdict 11/6/17. In discovery phase before evidentiary hearing.
- 44 active First Degree Murder cases in 13 counties in Idaho's district courts.
- Death Notice filed in 4 cases.

## Commissions and Committees

- >Idaho Criminal Justice Commission
- ➤ Public Defense Commission
- ➤ Idaho Grant Counsel
- > Idaho Supreme Court Technology Committee
- ✓ Idaho Criminal Rules Committee
- Idaho Rules of Evidence Committee
- >Idaho Appellate Rules Committee



"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Griffin v. Illinois, 351 U.S. 12 (1956)

# IDAHO CRIMINAL JUSTICE COMMISSION

LEGISLATIVE UPDATE 2022

## VISION

Collaborating For a Safer Idaho

## MISSION

The Idaho Criminal Justice
Commission is committed to
collaboration to address important
criminal justice issues and
challenges by developing and
proposing balanced solutions,
which are cost effective and based
on "best" practices to achieve a
safer Idaho.

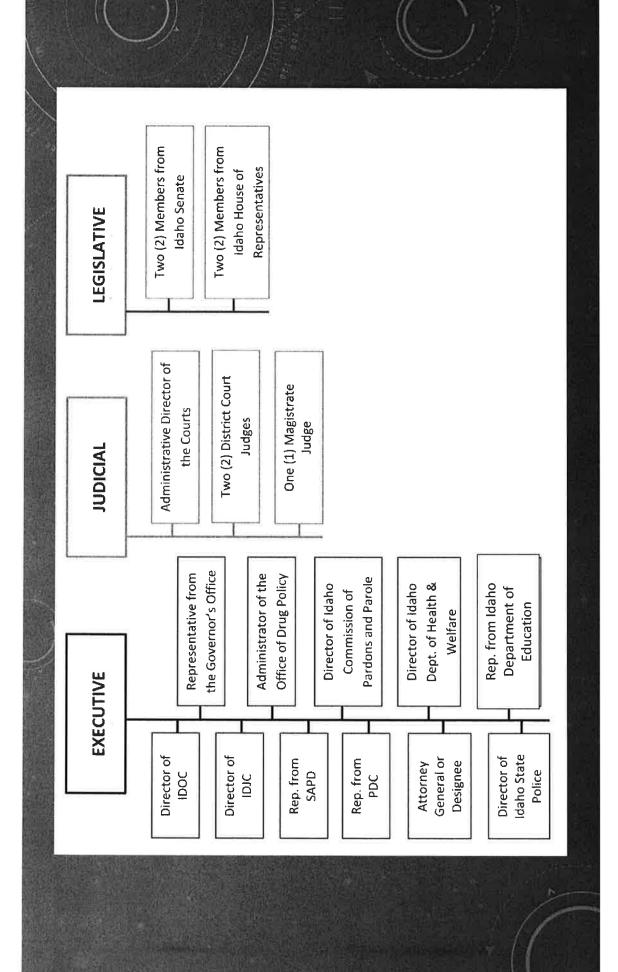
## VALUES

- We are **committed** to learning and enhancing our understanding.
- We **communicate** honestly.
- We encourage open dialogue and feedback.
- We are flexible and innovative.
- We keep our commitments.
- We respect all contributions.
- We are sensitive to the unique perception and needs of others.

# Executive Order 2020-20 BRAD LITTLE GOVERNOR



WHEREAS, it is in the best interest of the citizens of the State of Idaho that government promote efficiency and effectiveness of the criminal justice system and, where possible, encourage dialogue among the respective branches of government to achieve this effectiveness and efficiency...



## COUNTIES

CITIES

One (1) Representative from Idaho Prosecuting Attorney's Association

One (1) Representative from Idaho Chiefs of Police Association

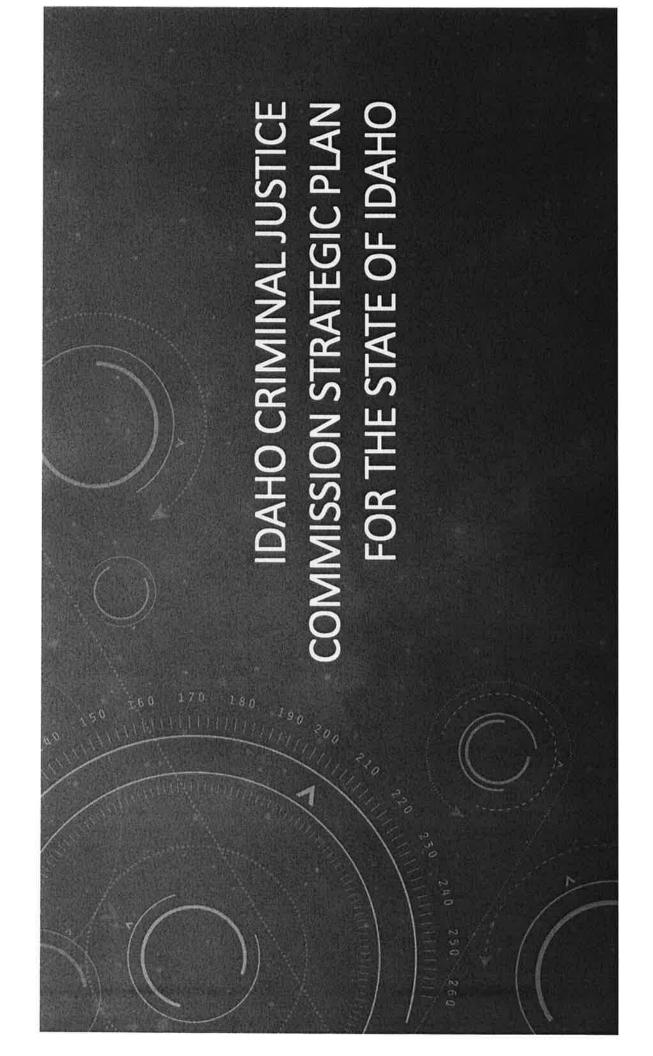
One (1) Representative from Idaho Sheriff's Association

## **OTHER STAKEHOLDERS**

Three (3) Citizens with
Consideration Given to those with
Experience/Education Related to
the Mission of the Idaho Criminal
Justice Commission, and/or those
Representing Tribal or other
Underrepresented Communities in

The U.S. Attorney for the District of Idaho

WHEREAS, communication and cooperation among the professionals is of utmost importance in promoting various facets of the community of criminal justice efficiency and effectiveness...



# COMBATING CRIME AND PROTECTING CITIZENS

GOAL - Reduce victimization and recidivism in the state or

accountability, prevention, education, and recidivism reduction. Objective 1: Identify and establish subcommittees relating to

Objective 2: Strengthen knowledge base in Idaho by enhancing data collection abilities and sharing capabilities

# PROVIDING POLICY MAKERS AND CRIMINAL JUSTICE DECISION MAKERS WITH ACCURATE INFORMATION

interventions by proposing balanced solutions, which are cost GOAL - Advance delivery of justice through effective effective and based on best practices

Objective 1 - Determine reasonable expectation of community needs and services based on resources

Objective 2 - Promote standards and equity

expanded use of risk assessments, policies and programming Objective 3 - Reduce criminogenic risk factors through the

Objective 4 - Ongoing assessment of problem solving courts and other community-based sentencing alternatives

Objective 5 - Examine emerging issues

# PROMOTING EFFICIENCY AND EFFECTIVENESS OF THE CRIMINAL JUSTICE SYSTEM

GOAL - Promote well-informed policy decisions

Objective 1 - Identify strategies to promote efficiencies and effectiveness in the criminal justice system Objective 2 - Continue presentations and training on trends, best practices and priority issues Objective 3 - Create and implement data sharing mechanisms and agreements among stakeholder agencies Objective 4 - Maintain awareness of substance abuse trends and priority

Objective 5 – Identify sustainable funding for priorities in ICJC's strategic plan

# SUBCOMMITTEE WORK

RESEARCH ALLIANCE MENTAL HEALTH AND SUBSTANCE ABUSE **HUMAN TRAFFICKING** 

MISSING AND MURDERED INDIGENOUS PERSONS

GRANT REVIEW COUNCIL

SEX CRIMES/OFFENSE

# MENTAL HEALTH AND SUBSTANCE ABUSE SUBCOMMITTEE

Largely on hold with the Commission.

Awaiting direction from the Idaho Behavior Health Council

# RESEARCH ALLIANCE

- In 2020, the Idaho Legislature passed the I.C. 19-4801-4804:
- The Criminal Justice Integrated Data System Act
- A centralized data repository to maintain and link data across separate entities to aid in evaluating the effectiveness of the criminal justice system and enable datadriven, cost-saving decision making.
- Began meeting in December of 2020. Most recently in December of 2021.

# **HUMAN TRAFFICKING**

- Committee's Focus
- Gaps in Enforcement
- Detection
- Support Systems for Victims
- Drafted Amended Language for I.C. 18-8601-8603 (Passed 2019)
- Created Safe Harbor Provision for victims of human trafficking I.C. 18-8606 (Passed 2019)

# SEX OFFENSE/CRIMES

- Statutes were reviewed, proposed changes include:
- Removal of unconstitutional statutes:
- Adultery, fornication and infamous crimes against nature.
- Creation of new statutes to address sexual abuse of animals and human remains.
- Additions to criminal statutes to include foreign convictions.
- Amendments to timeframes for mailed registration notices.

## Idaho Criminal Justice Commission

Collaborating For A Safer Idaho

http://icjc.idaho.gov/

## Impact of Illicit Drugs: Focus on Fentanyl

Gary Dawson, RPh, PhD

Pharmacology and Forensic Toxicology Board Certified Psychiatric Pharmacist

January 19, 2022

1

## Disclosures

- I have no financial interests to disclose
- I am not representing or speaking for any business or governmental agency

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## What is fentanyl?

- Fentanyl is a synthetic (man-made) opioid 50 times more potent than heroin and 100 times more potent than morphine.
- $\triangleright$  It is in CSA Schedule II due it's potential for abuse and dependence
- > Medically, it is typically seen as an injection, transdermal patch and lozenges







3

## What is fentanyl?

- ➤ Pharmaceutical fentanyl is primarily prescribed to manage severe pain, such as with cancer and end-of-life palliative care
- ➤ Non-pharmaceutical fentanyl (i.e., illicit or clandestine) is often mixed with heroin and/or cocaine or pressed into counterfeit pills—often without the user's knowledge

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### What is fentanyl?

> Fentanyl, the synthetic opioid most commonly found in counterfeit pills



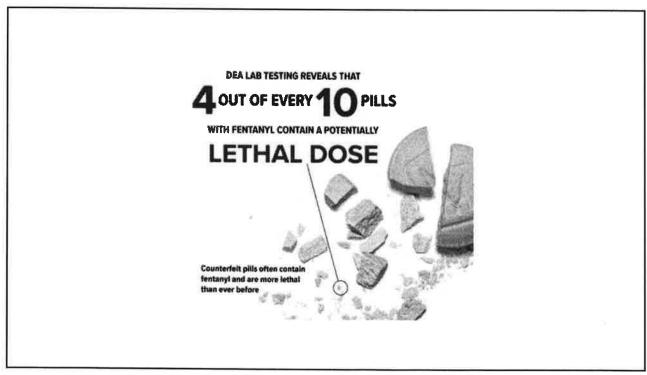


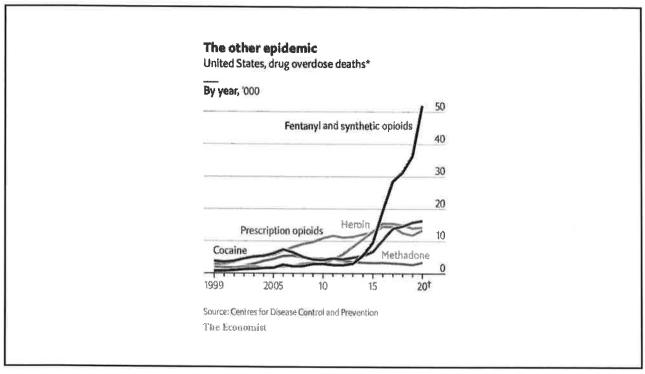


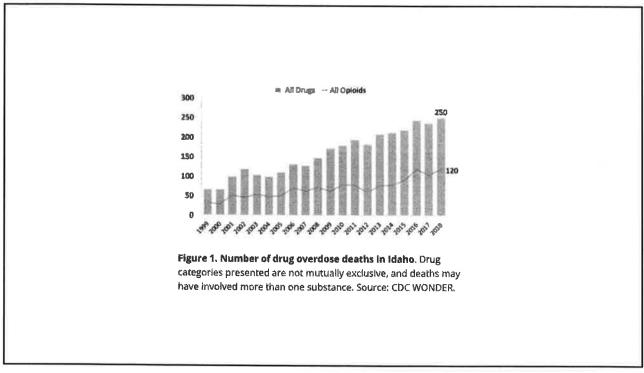


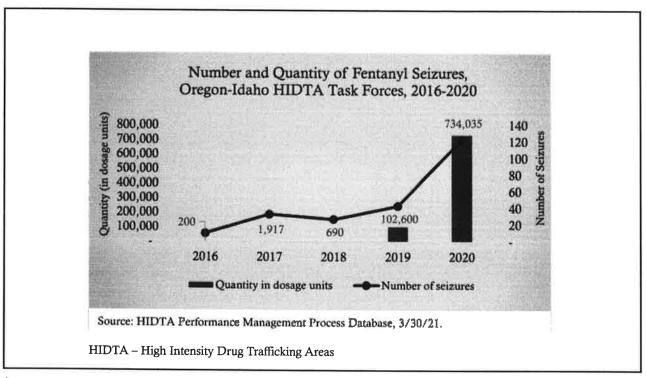


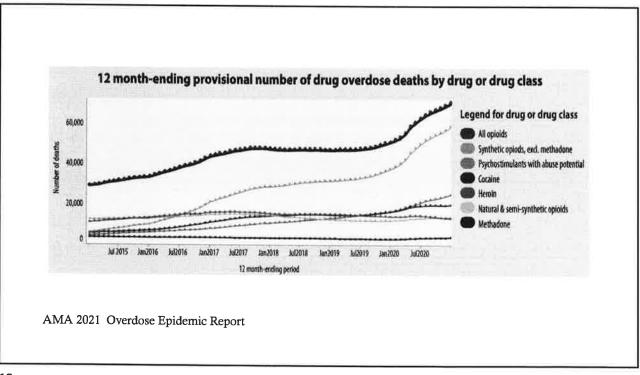
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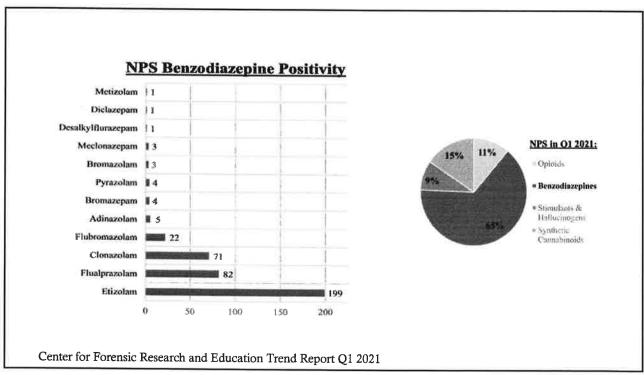




Fentanyl Analogs	Compared to Morphine
Fentanyl	80 to 100x
Acetylfentanyl	15x
Valerylfentanyl	< 20x
Furanylfentanyl	20x
Butyrylfentanyl	20 to 25x
Acrylfentanyl	100x
3-Methylfentanyl	400x trans and 6000x cis isomers
Carfentanil	10 000 to 100 000x

Schueler, HE. Emerging synthetic fentanyl analogs. Acad forensic Pathol, 2017, 7:36-40.

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### AMENDED AGENDA #1 SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

### Room WW54 Monday, January 24, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
DOCKET NO.:		
05-0000-2100	Notice of Omnibus Rulemaking - Proposed Rule Docket Nos. 05.01.02, 05.01.03, 05.01.04 and 05.02.01	Monty Prow, Director, Idaho Department of Juvenile Corrections
11-0000-2100	Notice of Omnibus Rulemaking - Proposed Rule Docket Nos. 11.03.01 through 11.13.01. Idaho State Police Omnibus Rules	Bill Gardiner, Lt. Colonel, Idaho State Police
11-1101-2100	Notice of Omnibus Rulemaking - Proposed Rule Docket No. 11.11.01 - Police Officers Standards & Training (POST)	Brad Johnson, Administrator, POST
11-0000-2100F	Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket Nos. 11.05.01 and 11.10.02	Bill Gardiner, Lt. Colonel, Idaho State Police
11-1001-2100F	Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket No. 11.10.01 - Public Safety (ILETS)	Leila McNeill, Bureau Chief, Criminal Investigation, Idaho State Police
50-0101-2100F	Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket No. 50.01.01 - Commission of Pardons & Parole	Ashley Dowell, Executive Director, Idaho Commission of Pardons & Parole
21-0000-2100F	Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket Nos. 21.01.01 and 21.01.04 - Veterans Services	Mark Tschampl, Chief Administrator, Idaho Department of Veterans Services

### Public Testimony Will Be Taken by Registering Through the Following Link: Register to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERS		COMMITTEE SECRETARY
Chairman Lakey	Sen Thayn	Sharon Pennington
Vice Chairman Ricks	Sen Zito	Room: WW48
Sen Lodge	Sen Burgoyne	Phone: 332-1317
Sen Lee	Sen Wintrow	Email: sjud@senate.idaho.gov
Sen Anthon		

### MINUTES

### **SENATE JUDICIARY & RULES COMMITTEE**

DATE: Monday, January 24, 2022

TIME: 1:30 P.M. PLACE: Room WW54

**MEMBERS** Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Lee, Anthon, Thayn,

PRESENT: Zito, Burgoyne, and Wintrow

ABSENT/ None

**EXCUSED:** 

NOTE: The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then

be located on file with the minutes in the Legislative Services Library.

Chairman Lakey called the meeting of the Senate Judiciary and Rules CONVENED:

Committee (Committee) to order at 1:30 p.m.

PASSED THE

GAVEL:

**Chairman Lakey** passed the gavel to Vice Chairman Ricks.

DOCKET NO.

05-0000-2100

Relating to Notice of Omnibus Rulemaking - Proposed Rule Docket Nos. 05.01.02, 05.01.03, 05.01.04 and 05.02.01. Monty Prow, Director, Idaho Department of Juvenile Corrections, explained this docket was the reauthorization of existing rules from the Idaho Department of Juvenile Corrections and has been previously reviewed and approved by the

Legislature. No changes are requested.

MOTION: Senator Burgoyne moved to approve Docket No. 05-0000-2100. Senator

Lee seconded the motion. The motion carried by voice vote.

Lt. Colonel Bill Gardiner, Deputy Director and Rules Review Officer, INTRODUCTIONS:

Idaho State Police, introduced Major Russ Wheatley; Captain Brad Doty; Captain Shawn Staley; Bureau Chief Leila McNeill (remote); Amy Campbell, Sex Offender Registry Supervisor; Kathy Blades Criminal History Records Supervisor: Matthew Gammet, Director of Forensic Services; and Sergeant

Jessie Avery with the Commercial Vehicle Safety Section.

DOCKET NO. 11-0000-2100: Relating to notice of Omnibus Rulemaking - Proposed Rule Docket Nos. 11.03.01, 11.06.01, 11.07.01, 11.07.02, 11.07.03, and 11.13.01. Lt. Colonel

Bill Gardiner, Deputy Director and Rules Officer, stated the dockets are non-fee with no changes and relate to rules governing alcohol testing, asset

forfeiture reporting, motor vehicles, and motor carrier rules.

Amy Campbell, Criminal Records Section Supervisor, Idaho State Police Sex Offender Registry, stated that Docket No. 11.10.03 has a change in § 012.06a – adding "official notification" and deleting "certified copy of a death certificate." This change would allow the Registry staff to remove a deceased offender from the Registry based on notification from other official sources, including a certified copy of a death certificate. The second change is in § 012.06 adding, "Pursuant to § 18-8310(1)(a), Idaho Code, any periods of supervised release, probation or parole without revocation references the offense(s) outlined in Idaho Code 18-8310(1)(d)." This is to clarify which supervised release, probation or parole would qualify an individual to be granted relief from registering as a sex offender in Idaho and clarifies that the unrevoked supervision, probation or parole must be from the offense or offenses that the subject was required to register as a sex offender.

MOTION:

**Senator Lee** moved to approve **Docket 11-0000-2100**. **Senator Thayn** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 11-1101-2100 Relating to Notice of Omnibus Rulemaking - Proposed Rule Docket No. 11.11.01 - Police Officers Standards & Training (POST). Brad Johnson, Administrator, POST, stated the docket contains several cleanup changes and four substantive changes. 1) The rule is being changed from a fee to non fee rule. 2) The addition of biannual minimum mandatory in-service training subjects and hours as approved by the POST Council in June 2021. They include 8 hours of firearm training, 8 hours of defensive tactics, 4 hours emergency vehicle operations and 4 hours of legal updates. 3) Additional guidance and clarification for the procedure of the decertification rules and processes. 4) Adds violation of the Controlled Substances Act while employed as an officer as grounds for mandatory decertification. It has always been a disqualifier for certification but it was discretionary for employed officers. This change would make it mandatory.

DISCUSSION:

A lengthy discussion was held regarding various aspects of these rule changes/additions. Senators Burgoyne, Lee, Anthon, Wintrow, Zito and Chairman Lakey participated in the discussion. Concerns included due process for police officers, clarification made to determine whether the drug code was violated without either a charge or a conviction, and a need for a concise definition of "public safety" and positions which fall under that category. Officer Johnson responded to each specific concern. Chairman Lakey summarized the questioning stating that the rules didn't articulate the process well and the rule changes are clarifying the process. Officer Johnson said that was correct.

Senator Burgoyne stated that he was not comfortable with a rule that purports to set out a standard when there is not a definite definition given. Senator Wintrow asked if there were any organizations who came forth with concerns about the rule. Officer Johnson said there was an individual who represented Idaho Home School. They met with him and agreed, going forward, to work harder to address some of the home school applicant's issues. Senator Burgoyne stated that the language in this rule is ambiguous, and he is not comfortable with the way it is written. Senator Zito commented that she was uncomfortable with the rule for two reasons. The first is who can make the charge against the officer and the second is why would someone be punished for something they didn't do, if it was never proven that they did it.

MOTION:

Senator Burgoyne moved to approve Docket 11-1101-2100 with the exception of  $\S$  110.01.d. Senator Thayn seconded the motion.

SUBSTITUTE MOTION:

**Senator Lee** moved to approve **Docket No. 11-1101-2100** in its entirety. **Senator Anthon** seconded the motion.

**DISCUSSION:** 

Chairman Lakey commented that everyone should be held to the same standard. However, the standard changes in a criminal case where you are removing someone's liberty versus a civil determination regarding employment. As other state's standards come into play, determining the standard becomes more complex. Chairman Lakey stated he would vote in favor of the substitute motion.

**Senator Lee** stated she believes there are concerns with this legislation but she is in favor of getting it approved, watching to see what happens with it, and moving forward on it again next year.

**Senator Anthon** said the biggest risk with this rule is the potential for a lawsuit. He agrees with Senator Lee that there needs to be something in law stating that police officers don't use drugs and they don't deal drugs. He stated that he would encourage some rewriting and clarifying language.

**Senator Burgoyne** stated he would vote in opposition to the motion. He commented he does not think the potential injustices or problems with the rule being interpreted more broadly than it is intended will be seen.

**Senator Wintrow** added she has concerns about the mandatory decertification. She said she would prefer to give the Council the discretion to make the ultimate decision.

SUBSTITUTE MOTION VOTE:

The vote to approve Substitute Motion was taken and passed by **voice vote**. **Senators Burgoyne, Thayn**, and **Wintrow** voted in the negative and asked to be recorded as such.

DOCKET NO. 11-0000-2100F

Relating to Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket Nos. 11.05.01 and 11.10.02. Lt. Colonel Bill Gardiner, Idaho State Police, explained that rules governing alcoholic beverage control and those governing a State criminal history record have no changes.

DOCKET NO: 11-1001-2100F

Relating to Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket No. 11.10.01. Lelia McNeill, Bureau Chief, Criminal Investigation, Idaho State Police (ILETS), explained that ILETS accesses a wide range of information through the Nlets network. It operates as an international system and network and is the only provider of this capability in the United States. The system user/access fees paid by state users for services rendered, funds all operations of the system and network and are set by the Principal (state) membership once a year at the Nlets Annual Business Meeting. § 018.02a and b change the annual access fees for county or municipal level agencies from \$5,000 annually to \$5,425. The state, federal and tribal agencies will increase from \$8,750 annually to \$9,000. These fees are required to keep Idaho a part of the Nlets network (see Attachment 1).

MOTION:

Senator Wintrow moved to approve Docket No. 11-1001-2100F. Senator Lodge seconded the motion. The motion carried by voice vote.

DOCKET NO. 50-0101-2100F

Relating to Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule Docket No. 51.01.01 - Comission of Pardons & Parole. Ashley Dowell, Executive Director, stated that there was a public hearing in November to discuss the rule changes. No one attended and there were no written concerns relating to the changes. Director Dowell explained that the rules update statute references in the rules as the Commission now has its own chapter in Idaho Code. Changes reflect better business practices, consistent requirements for hearing attendance and notification for commutations decisions. The Commission added an extradition waiver to the conditions of parole and clarified no parole bonds were allowed. Director Dowell indicated that the Commission received authority for rulemaking on Foreign National Treaty requests, respites and reprieves and added processes for such petitions. They removed unnecessary or obsolete language or definitions to ensure that their rules had a net overall reduction of words.

DISCUSSION: Senator Lee questioned why there seemed to be additional authority given to the executive director and removed from the commissioners. Director **Dowell** responded that it is for efficiency and allowing discretion to the executive director. She indicated that these are long standing practices being formalized in the rules. Senator Burgoyne asked for a clarification on making appearances at parole hearings mandatory. Director Dowell explained that it is just to provide a consistent approach to people who are not coming to their hearings. MOTION: Senator Lee moved to approve Docket No. 50-0101-2100F. Senator Lodge seconded the motion. Motion carried by voice vote. DOCKET NO. Relating to Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule 21-0000-2100F Docket Nos. 21.01.01 and 21.01.04 - Veterans Services. Mark Tschampl, Chief Administrator, Idaho Department of Veterans Services. Chief Tschampl explained that both rule chapters being discussed had been previously reviewed and approved by the Legislature. There were no changes in 21.01.01 relating to governing admission, residency and maintenance charges in the Idaho State Veteran's Home and the Division of Services Administrative Process Procedure. There were changes made to 21.01.04 relating to the rules governing Idaho State Veteran's Cemeteries. An increase in fees from \$500 to \$700 associated with preparation of an internment site not containing a pre-placed crypt due to increased costs or materials and labor. Chief **Tschampl** stated that sections relating to burial and public behavior within cemeteries were simplified. DISCUSSION: **Senator Lee** asked if there would be signs in the cemeteries announcing public behavior rules. Chief Tschampl responded that there would be. MOTION: Senator Lee moved to approve Docket No. 21-0000-2100F. Chairman **Lakey** seconded the motion. Motion carried by **voice vote**. PASSED THE Vice Chairman Ricks passed the gavel to Chairman Lakey. GAVEL: ADJOURNED: There being no further business at this time. Chairman Lakev adjourned the

meeting at 3:05 p.m.

Sharon Pennington Senator Lakey Secretary Chair



Steven E. Correll
Executive Director

1-24-2022

Charles Schaeffer, President Wyatt Pettengill, 1<sup>st</sup> Vice President Tim Struck, 2<sup>nd</sup> Vice President

To:

State Budget Personnel

From:

Shawn Scriven, Nlets Director of Finance

Date:

09/19/2019

Re:

Nlets User/Access Fee to Increase July 1, 2021

Nlets is a 501(c) (3) not-for-profit corporation owned and operated by the fifty States, districts and territories known as the Principal membership and is administered by a Board of Directors elected from those state law enforcement agencies. Nlets is unique in that it operates an international system and network accessible by all criminal justice agencies and is the only provider of this capability in the US. The users of the network are criminal justice agencies, both state and federal and at all levels of government. Through the Nlets network, law enforcement and criminal justice agencies can access a wide range of information, from standard driver license and vehicle queries to criminal history and Interpol information. Once again there is no other entity in the United States public, private, or governmental which provides this capability.

The data and information exchange provided by Nlets will be used nearly 3 billion times in 2019. It is critical to public safety and therefore the network and system must always be up and operational. Nlets employs a small full-time staff of 35 professionals to ensure this 100% system uptime. Additionally, Nlets also pays for land-line data circuits, two network routers, and a backup wireless connection for each State & US Territory as well as all travel expenses for Nlets state/federal representatives for all training opportunities as well as travel related to performance of their Nlets management duties. Its state-of-the-art data center is located in Phoenix, Arizona with a disaster recovery center currently located in Kentucky but moving to Texas by end of 2019. Public safety officials can connect to over 130 data sources through the robust message switching system that Nlets provides.

The System User/Access fees collected by Nlets for services rendered funds all operations of the system and network and are set by the Principal membership once a year at the Nlets Annual Business Meeting (ABM). Since 2004, the monthly fee has been set at \$4,000 per month. In addition to Principal members, Nlets also provides services to Federal members, Associate members, and Strategic Partners. The supplemental revenue generated from these other membership categories has covered the increase in operational costs directly related to Principal members since 2004.

At the 2019 ABM, the Principal membership (state Nlets Representatives), after a thorough review of the facts, voted to increase monthly rates to \$7,000 starting January 1, 2021 and increasing 2% each year thereafter. The Board of Directors amended the start date of the rate increase to July 1, 2021 and have the 2% annual increase thereafter be subject to Board of Directors review and approval. The justification of this rate increase provided to the Principal membership at the ABM showed supplemental revenue sources unable to cover future operational expenses.

Should you have any questions regarding this rate increase, please do not hesitate to contact Shawn Scriven at 623-308-3543 or sscriven@nlets.org.



### Idaho State Police

Service Since 1939

### Bureau of Criminal Identification



May 21, 2020

Dear Sheriffs,

I am writing on behalf of the ILETS Board regarding ILETS direct access fees. As you may know, ILETS accesses a wide range of information through the Nlets network, from standard driver's license and vehicle queries to other states' criminal history and Interpol information. Nlets operates its international system and network as the only provider of this capability in the U.S.

The system user/access fees paid by state users for services rendered funds all operations of the system and network and are set by the Principal (state) membership once a year at the Nlets Annual Business Meeting. Since 2004, the monthly Principal member user access fee has been set at \$4,000 per month. In addition to Principal members, Nlets also provides services to Federal members, Associate members, and Strategic Partners. The supplemental revenue generated from these other membership categories has covered the increase in operational costs directly related to Principal members since 2004.

At the 2019 Annual meeting and after a thorough review of the facts, the Nlets Principal membership voted to increase monthly rates to \$7,000 per month, with possible increases 2% each year thereafter based on a Board of Directors review and approval. The effective date for this increase is July 1, 2021. The ILETS Board has determined that the current ILETS user access fees will be insufficient to cover that increase over time.

At a special meeting of the ILETS Board on May 14, 2020, the Board voted in favor of raising user access fees to cover the Nlets increase. <u>Beginning October 2021</u>, access fees for physical connection to the ILETS network will increase as follows:

- County and municipal agencies access fees will increase to \$5,425 per line annually; and
- Federal, state, and tribal agencies will increase to \$9,000 per line annually. All agencies will continue to be billed quarterly for these fees.

The ILETS fund will be able to cover the first quarter increase from Nlets (Jul 2021-Sep 2021) in order to allow ILETS users ample time to include this increase in their budgets for FY22.

If you have any questions, you can contact me via email at leila.mcneill@isp.idaho.gov or by phone at 208-884-7136.

Sincerely,

Leila McNeill, CPM

eila McNeill

Bureau Chief

700 S. Stratford Drive, Suite 120 • Meridian, Idaho 83642-6202

### **AGENDA**

### SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

### Room WW54

Wednesday, January 26, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
RS 29219	Relating to Allowing Homeowners or Tenants to Update Housing Covenants in Compliance with the Fair Housing Act	Senator Wintrow
06-0000-2100	Notice of Proclamation of Omnibus Rulemaking - Rules Including 06.01.01, 06.02.01, 06.02.02	Josh Tewalt, Director, Idaho Department of Correction
57-0101-2100F	Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule - Rules of the Sexual Offender Management Board	Nancy Volle, Program Manager, Sexual Offender Management Board

Public Testimony Will Be Taken by Registering Through the Following Link:

Register to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERS COMMITTEE SECRETARY

Chairman LakeySen ThaynSharon PenningtonVice Chairman RicksSen ZitoRoom: WW48Sen LodgeSen BurgoynePhone: 332-1317

Sen Lee Sen Wintrow Email: sjud@senate.idaho.gov

Sen Anthon

### **MINUTES**

### **SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Wednesday, January 26, 2022

**TIME:** 1:30 P.M.

PLACE: Room WW54

MEMBERS Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Anthon, Thayn, Zito,

**PRESENT:** Burgoyne, and Wintrow

ABSENT/ Senator Lee

EXCUSED:

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

**CONVENED:** Chairman Lakey called the meeting of the Senate Judiciary and Rules Committee

(Committee) to order at 1:30 p.m.

RS 29219 Relating to Allowing Homeowners or Tenants to Update Housing Covenants

in Compliance with the Fair Housing Act. Senator Melissa Wintrow explained that RS 29219 relates to properties which have restricted covenants attached to them stating that you must be a white person or a servant in order to legally live there. Senator Wintrow stated this legislation would allow a homeowner or tenant to go to the county clerk voluntarily to modify the language on their

covenant or deed.

MOTION: Vice Chairman Ricks moved to send RS 29219 to print. Senator Lodge

seconded the motion. Motion passed by **voice vote**.

PASSED THE

GAVEL:

Chairman Lakey passed the gavel to Vice Chairman Ricks.

DOCKET NO. 06-0000-2100

Notice of Proclamation of Ommnibus Rulemaking including 06.01.01, 06.02.01, 06.02.02. Josh Tewalt, Director, Idaho Department of Correction, explained that there were no changes to 06.02.01 regarding governing the supervision of offenders on probation and parole. There were also no changes to 06.02.02 relating to rules governing release readiness. Director Tewalt stated he would focus on **Docket No. 06.01.01** relating to rules of the Board of Correction. Two chapters were consolidated into one. The rules governing Idaho Correctional Industries, also under the purview of the Board of Correction, were consolidated as a sub-chapter to this rule. It was edited for clarity and simplicity. There were two substantive changes made to this chapter. The first change relates to people permitted to witness executions. It is difficult and overwhelming to the victim's families and the family of the condemned. Liaisons are appointed early in the process to provide help and resources when they are needed. The standard procedure is to allow the liaisons to remain with the parties in the witness areas, if requested, during the execution. This provision is in the rule as well. The second change deals with organ and tissue donation by people sentenced to the custody of the Board of Correction. This was brought to the attention of the Board when a family making end of life decisions for a person in custody and on life support, was denied the chance to donate his organs. The Board agreed that the previous language was too restrictive and opted to make this change so other families would not be denied the same opportunity. The new provision for organ and tissue donation is in accordance with State law, while clarifying neither the Board nor Department may consent on someone's behalf.

DISCUSSION: Senator Wintrow asked if the only person who could consent to donation would be the inmate who is in custody. **Director Tewalt** explained there are two circumstances where other people can make the decision. The first is a living donation where someone may have a relative who may need an organ. The other instance would be if the inmate is incapacitated and the family or power of attorney is making the end of life decision, and has the ability to consent on the person's behalf. **DISCUSSION:** A discussion was held regarding execution practices relating to public disclosure, number of people allowed to be present and the general practices involved in executions. Senators Burgoyne and Wintrow participated in the discussion. Director Tewalt addressed their concerns and explained that the public was being informed about executions and information was not being withheld. He indicated that there could be exceptions made to the rule of 2 people attending in some circumstances. Director Tewalt summed up his feeling about the Department of Correction and their handling of executions by stating the way they approach this solemn responsibility is as if it is a reflection on them, not as a reflection on the condemned. MOTION: Chairman Lakey moved to approve Docket No. 06-0000-2100. Senator Anthon seconded the motion. Motion carried by voice vote. Relating to Notice of Omnibus Rulemaking (Fee Rule) - Proposed Rule -DOCKET NO. 57-0101-2100F Rules of the Sexual Offender Management Board (SOMB). Nancy Volle. Program Manager, SOMB, explained she would be presenting **Docket No**. **57-0101-2100F** which is the omnibus reauthorization for the existing fee rule. This rule making does not impose or increase any fees or charges beyond what was previously approved by the prior rule. Any revisions made were general housekeeping to remove unnecessary references for red tape reduction compliance. MOTION: Senator Wintrow moved to approve Docket No. 57-0101-2100F. Chairman Lakey seconded the motion. Motion carried by voice vote. PASSED THE Vice Chairman Ricks passed the gavel back to Chairman Lakey.

There being no further business at this time, **Chairman Lakey** adjourned the meeting at 2:00 p.m.

GAVEL:

ADJOURNED:

### **AGENDA**

### SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

### Room WW54

Wednesday, February 02, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
GUBERNATORIAL APPOINTMENT VOTE:	Vote on the Gubernatorial Reappointment of Anna "Janie" Dressen to the Commission on Pardons and Parole	
INTRODUCTION:	Introduction of Participating Judges	Judge Juneal Kerrick, Senior District Judge, Administrative Office of the Courts
PRESENTATION:	The Need for Additional Judicial Resources in the Fourth District	Judge Steven Hippler, Administrative District Judge, Fourth Judicial District
PRESENTATION:	The Work of Trial Court Administrators	Judge Dane Watkins, Jr., Administrative District Judge, Seventh Judicial District
PRESENTATION:	The Challenges of District Judge Recruitment	Judge Jeff Brudie, Senior District Judge, Executive Director, Idaho Judicial Council
<u>S 1240</u>	RESTRICTIVE COVENANTS - Adds to existing law to provide for the prohibition and removal of racially restrictive covenants for real property	Senator Wintrow

Public Testimony Will Be Taken by Registering Through the Following Link:
Register to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERS COMMITTEE SECRETARY

Chairman LakeySen ThaynSharon PenningtonVice Chairman RicksSen ZitoRoom: WW48Sen LodgeSen BurgoynePhone: 332-1317

Sen Lee Sen Wintrow Email: sjud@senate.idaho.gov

Sen Anthon

### MINUTES

### **SENATE JUDICIARY & RULES COMMITTEE**

DATE: Wednesday, February 02, 2022

TIME: 1:30 P.M.

PLACE: Room WW54

**MEMBERS** Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Anthon, Thayn,

PRESENT: Zito, Burgoyne, and Wintrow

Senator Lee ABSENT/

**EXCUSED:** 

NOTE: The sign-in sheet, testimonies and other related materials will be retained

> with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman Lakey called the meeting of the Senate Judiciary and Rules CONVENED:

Committee to order at 1:30 p.m.

**VOTE ON GUBERNATORIAL** 

Vice Chairman Ricks moved to send the Gubernatorial Reappointment of Anna "Janie" Dressen to the Commission of Pardons and Parole to the REAPPOINTMENT: floor with a recommendation that she be confirmed by the Senate. Senator

**Burgoyne** seconded the motion. The motion carried by **voice vote**.

INTRODUCTION: Judge Juneal Kerrick, Senior District Judge, and Administrator of the

Courts, introduced the district judges who would present. She stated that Judge Steven Hippler, Administrative District Judge in the Fourth District in Ada County, had been a judge since 2013. The second presenter was Administrative District Judge, Judge Dane Watkins, Jr. from the Seventh Judicial District. Judge Watkins had been on the bench since 2011. The third presenter was Judge Jeff Brudie who retired after 20 years on the bench from the Second District in Lewiston. Judge Brudie also serves on

the Idaho Judicial Council.

PRESENTATION: Judge Steven Hippler, Administrative District Judge, Fourth Judicial District,

> stated that his presentation topic was "The Need for Additional Judicial Resources in the Fourth District." **Judge Hippler** explained the request made was for one additional district judge to be chambered in Elmore County, a court reporter and two additional magistrate judges for Ada County. Their request was a result of three main factors including population growth, increasing caseloads and backlogs, and the impact on services to the citizens. These additions made it possible to continue to provide innovations that result in better services within the judiciary in the Fourth District. Judge Hippler explained the background and needs related to these requests. He described the heavy workload and increasing demands placed on the current judges. The specialty treatment courts had been very successful with their programs, but additional resources were needed to keep them functioning. The Fourth District had organized and used several innovations that were very helpful with areas such as civil protection orders, warrants court, domestic violence court, family interdisciplinary settlement courts and others. These programs reduced the number of people tried and incarcerated. There was a growing concern with burnout as the judges tried to keep up with the

current and growing case loads (see Attachment 1).

**DISCUSSION:** 

Vice Chairman Ricks asked if Judge Hippler had any recommendations that would help with the family court scenarios. Judge Hippler stated that adding a magistrate to be assigned to family law courts would reduce the docket numbers. In addition, their request allowed the Fourth District to continue having integrated settlement conferences. Those conferences included professionals who would give guidance to the parties with resolutions often reached. Senator Lodge asked if there was physical space for the new judges. Judge Hippler said that there was ongoing planning for office space and there would be space available. Chairman Lakey asked if there was a plan to deal with the backlog of cases. Judge Hippler responded that the individual districts came up with their own plans. He explained that with Covid the courts had not been on a regular schedule, but when they were in session, scheduling was arranged to accommodate as many trials as possible.

PRESENTATION:

Judge Dane Watkins, Jr., Administrative District Judge, Seventh Judicial District, said he would be presenting on "The Work of the Trial Court Administrators." s stated he believes the Trial Court Administrators (TCA) are some of the most dedicated, hardworking officials in the State. The TCA is the hub of all the activities related to the Judicial district in which they are employed. They are the connection between the courts and every independent county in dozens of ways. Whenever there was a question to be answered, the first response was to go to the TCA. Some of their responsibilities include, but are not limited to, recording every proceeding from every courthouse, managing a complex budget that requires interaction with elected officials, clerks and designees, and judicial retirements and selections. The TCAs manage assignments for retired judges, are the contact person for media, provide training, education, and assistance for elected clerks. Judge Watkins added that in addition to these responsibilities, they are often asked to travel across the district to conduct various meetings. He reiterated that the request being made would help lighten the load of the Trial Court Administrators and give them a chance to do things they have been unable to accomplish.

DISCUSSION:

Vice Chairman Ricks asked if there was a backlog of cases in eastern Idaho. Judge Watkins indicated that there was. He said that the judges in the Seventh Judicial district were working together with the parties' counsel on both sides, private lawyers, and public lawyers to work through as many cases as possible when the facilities were available. Judge Watkins explained that the use of Zoom during the pandemic had been very efficient and would probably continue to be used as needed. Chairman Lakey asked how the technology used was implemented and funded. Judge Watkins responded that for case management the Odyssey program had been a great time saver for the judges. Some court reporters from other parts of the State had transcribed remotely. The subscription fees that allowed the technology used were not prohibitive.

### PRESENTATION:

Judge Jeff Brudie, Retired Senior District Judge, Executive Director, Idaho Judicial Council, stated that he would discuss "The Challenges of District Judge Recruitment." Judge Brudie explained it had become a challenge to assist the Governor in appointing replacements for vacancies in the district courts. He stated the applicant numbers since 2018 had shown a decline and indicated there were three factors contributing to the decrease. They included compensation, the possibility of a contested election, and the selection process of going through the Judicial Council to the Governor for appointment. Attorneys who were in private practice would most likely have to take a salary decrease and most of them want to keep their judgeship until retirement. Taking a salary cut is not attractive when one is looking toward retirement. There were many election aspects that came into play for magistrate judges applying for a district judge position. Judge Brudie commented that it may be wise to do a survey to measure attitudes regarding the District Judge recruitment concerns.

**DISCUSSION:** 

Senator Wintrow stated she hoped that judges are nonpartisan, fair and impartial and asked how to ensure that was happening. Judge Brudie stated that a judge was not supposed to be taking the bench with an agenda. Senator Burgoyne asked how important the partisan factor was in people not applying for the positions. Judge Brudie responded that the two top reasons depended on who they were. Private practice attorneys said compensation. Magistrates said it was the election process. Senator Burgoyne commented that he understood having gone before the Judicial Council once, possibly two or three times, seemed like an impediment to the application process. Judge Brudie added that it was difficult and it became a very competitive process.

S 1240

**Senator Wintrow** presented **S 1240** relating to restrictive covenants. **Senator Wintrow** said **S 1240** would add to existing law to provide for the prohibition and removal of racially restrictive covenants for real property. People would no longer be denied the opportunity to use or occupy real property with the limitations of race, color, ethnicity or national origin. The legislation was being kept in historic context of something that actually happened in our country. A homeowner may voluntarily amend their own documents and **S 1240** provided a path for people who want to take the language out of their covenant or deed. A form would be available in every county to enable owners to make the necessary change. A placeholder would be in the title chain indicating that the language had been outlawed and would not be enforced.

TESTIMONY:

The following testimonies were given **in favor** of passing **S 1240** (see Attachment 2):

McKav Cunningham, Professor, The College of Idaho

Zoe Olson (Virtual)

Ed Labinski, Home Owner in Warm Springs Mesa, Boise, Idaho

Linda Ipaye, Realtor, Boise, Idaho

MOTION: Senator Thayn moved to send S 1240 to the Senate floor. Senator Anthon

seconded the motion. The motion carried by voice vote.

**ADJOURNED:** There being no further business at this time, **Chairman Lakey** adjourned the

meeting at 2:55 p.m.

Senator Lakey	Sharon Pennington
Chair	Secretary



# House Judiciary, Rules & Administration Committee *February 1, 2022*

Senate Judiciary & Rules Committee February 2, 2022

### Today's Agenda:

### Introduction

Senior District Judge Juneal Kerrick

The Need for Additional Judicial Resources in the Fourth District

Administrative District Judge Steven Hippler, Fourth Judicial District

The Work of Trial Court Administrators

Administrative District Judge Dane Watkins, Jr., Seventh Judicial District

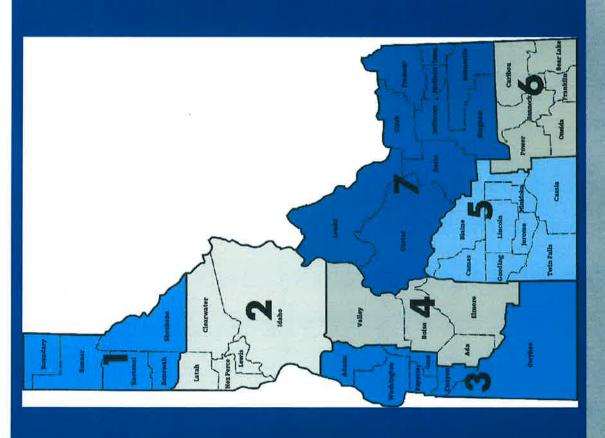
The Challenges of District Judge Recruitment

Senior District Judge Jeff Brudie, Executive Director of the Idaho Judicial Council





### Idaho's Judicial Districts





## Fourth Judicial District

Honorable Steven Hippler

Administrative District Judge





1 District Judge-Elmore County

1 Court Reporter

2 Magistrate Judges-Ada County





Population Increase

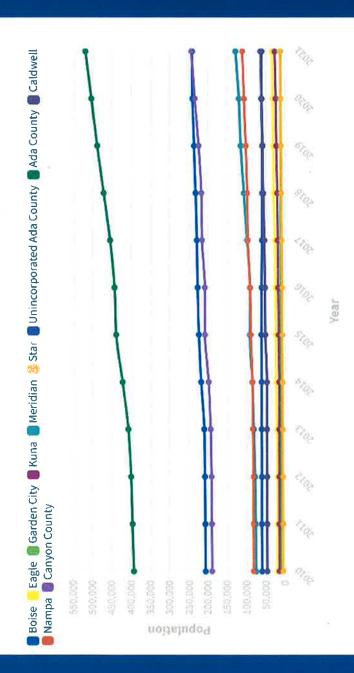
Increasing Caseloads & Backlog

Impact on Services to Citizens

## Population growth in Ada and Canyon counties

The combined population of Ada and Canyon counties have grown more than 31% since 2010, according to COMPASS estimates.

Enter series to show



🌞 A Flourish chart

Source: COMPASS • Created by Hayley Harding, Idaho Statesman





## Backlog & Caseload

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## Treatment Courts

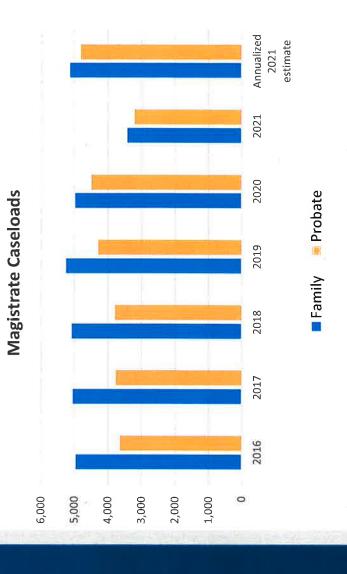




- Since 1999,
- 1,573 people graduated from Treatment Court Programs.
- 143 drug free babies have been born to women in Drug Court.
  - 20% of the graduates returned to school and worked on completing their G.E.D., diploma or attended college while in the Drug Court Program.
- At the time of program entry, 28% of the total graduates were employed. At graduation, 96% of graduates were employed.
- Unemployed graduates were enrolled in school full time, were doing volunteer work due to a disability, or on maternity leave with a newborn.
- Since 2015, graduates have performed over 49,000 hours of community service.
- The annual economic impact of graduates based on wage increase alone is over 23 million. Amount based on the yearly increase in wages of \$23,710,698.43 or \$17,206.60 per person, per year. (Average rise in wages per graduate is \$8.05/hr.).
- The amount of money saved in incarceration and supervision costs, and impact to communities from prevented criminal behavior is incalculable.











## Innovations——Criminal and CPO

Warrants Court

Civil Protection Orders

Domestic Violence Court

Family Interdisciplinary Settlement Conferences

One Family-One Judge

Vertical Representation

Agency Specific Dockets

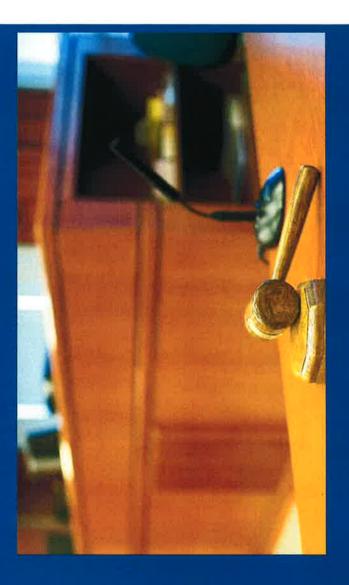
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Thank you for your continued support.





### The Challenges of District Judge Recruitment

Executive Director of the Idaho Judicial Council Senior District Judge Jeff Brudie

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# The Challenges of District Judge Recruitment

Executive Director of the Idaho Judicial Council Senior District Judge Jeff Brudie

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Attachment 2 McKay Cunvingham

REDLINING & INTERGENERATIONAL WEALTH IN IDAHO

RS 29.219 Sen. Wintrow

[Chair and Cte] Chairman Lakey; Members of the Ctp

Mr. Chart & and.

Introduction:

I am an Idahoan (live in Boise, w/ wife and four children)

Been a lawyer for 22 years

(although I practiced for several years) Primary vocation as educator and academic Over 13 years as law professor - focusing and publishing in Constitutional Law/Property Law

Currently a professor and administrator at the College of Idaho – in Caldwell.

Purpose:

My primary purpose is to answer the question why? What is the problem the law seeks to address? Why do we have this problem?

So, I'll briefly speak about historical policies that lead us to this moment - legislation

Overview: \_

In part, this legislation derives from two of the most pernicious legal practices undermining inclusion, and equity.

Racial covenants and redlining are relatively underappreciated historical practices that continue to generate discriminatory repercussions today.

Redlining:

federal program that provided home-ownership opportunities Redlining was a discriminatory practice that boxed out people of color from homeownership.

Banks, insurance companies, and brokers refused loans and mortgages within specific neighborhoods, based on the racial make-up of those neighborhoods.

In wake of the Great Depression

Stabilize

Via homeownership

financial Tooks

Number of financial tools to incentivize homeownership - particularly for low middle-class Americans.

Working class Americans didn't have today's equivalent of \$350,000 stashed under a mattress to buy a home. Banks instead would front 90 or 100 percent of the home price because the loans were backed by the federal government.

A federal agency was created to administer these programs/funds,

Home Owners' Loan Corporation 1933

Federal Housing Administration,

drew maps for over 200 cities to grade the riskiness of lending to neighborhoods.

[slide]

The maps were color-coded using an A to D scale.

A was green and deemed "best."

B was blue and labeled "still desirable."

C was yellow and marked "definitely declining."

And D was red and labeled "hazardous."

Neighborhoods that had people of color living in them were marked in red

- hence the term "redlining"
- and considered high-risk for mortgage lenders.

[slide SLC]

This redlining approach was NOT hidden or subtle

It was grounded in the work of two individuals, Homer Hoyt and Frederick Babcock.

-both high-ranking employees of the federal gvt – Fed Hous Admin.

Wrote books and underwriting manuals

maintained that minorities reduce property value and that the races should be kept separate

They even ranked races and nationalities by order of "desirability."

AND that is precisely what they did:

In New York City, for example, the Federal Housing Administration EXPLAINED the rationale for redlining a particular neighborhood:

"There is a steady infiltration of negro, Spanish and Puerto Rican into the area," and "colored infiltration is a definitely adverse influence on neighborhood desirability."

One of the most common Explanation for why a particular neighborhood was redlined = simple:

"Infiltration of: Negroes"

In Richmond Virginia – one neighborhood was coded Blue, instead of Green rating. Why? "Respectable people, but homes are too near negro area,"

Practice of Redlining was not isolated. It was replete across the Country:

Univ. of Richmond researchers created an interactive map. Screen shot. "Mapping Inequality" [Slide]

SUM:

Illustrates, from 1934 to 1968, the federal government made homeownership accessible to a subset of Caucasian people by guaranteeing their loans, but explicitly refused to back loans to people of color

<< transition to racial covenants >>

Didn't stop there. The private sector followed the federal gvt's lead.

The Gvt's practice of redlining worked hand-in-hand with the private sector's practice of racial covenants

Racial Covs:

Developers and private land owners embedded racial covenants in property deeds. Titles.

These racial covenants prohibit all non-whites from owning or occupying property within the neighborhood – unless doing so as a domestic servant.

[slide of language]

Typically, these racial covenants "ran with the land," a legal term that signifies perpetuity. le., racial covenant was not tied to the original owner of the land. It continued to bind <u>successive owners</u> because it "ran with the land."

There are likely thousands of properties in Ada County alone that still have racial covenants in their titles.

In very preliminary research -- of just one County in Idaho

- I've unearthed over 50 subdivisions in Ada County along with region

- I've unearthed over 50 subdivisions in Ada County alone with racial covenants.

Here is another example of a subdivision - Vista Avenue in Boise. [just down the road from where we sit] 1958

c & Wattonwide, it is estimated that more than half of

- all residential properties
- built during the post-depression housing boom
- included racial covenants.

<<< >>>

Of course redlining and racial covenants are outlawed today. The Fair Housing Act 1968 outlawed such practices.

cc&RS

It might be tempting to stop there.
If these practices are now illegal, what's the problem?

These policies, among others, have entrenched racial disparities. Have helped make racial disparities systemic to this day.

There is a clear connection between homeownership and wealth accumulation. It's critical. It is one of the few ways that any household, but particularly low or middle-income households, can accumulate wealth and pass that wealth to future generations.

Today, the wealth gap that separates whites from communities of color reflects the continuing impact of these historical practices.

[Slide]

The net worth of a typical white family, \$188,200, is nearly eight times greater than that of a black family at \$24,100 and more than five times the wealth of a Latinx family at \$36,100.

More locally:

[picture of 1960s demographics].

What does the River Street district look like now?

Our largest homeless population statewide.

Almost every single homeless shelter in Ada county is within or proximate to this district...

So.....this is the "why"

These are the past policies that lead to this moment. To this proposed legislation

Of course, this proposed Legislation does not attempt to remediate all of these historic inequities.

But it allows Idahoans to do something about it – if they choose to do so.

I've discussed this proposed legislation through the lens of redlining and racial covenants – ie., legal history.

Zoe Ann Olsen, who will speak next, has a much more compelling context by which to address this legisla

- how racial covenants are practically harming Idahoans today.

Zoe Ann...

Rothstein, Richard. Color of Law: A Forgotten History of How our Government Segregated America. Liveright, 2017.

Nancy H. Welsh, Racially Restrictive Covenants in the United States: A Call to Action, available (more than half – nationwide)

4

Neil Bhutta et al., Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances, FEDS NOTES (Sept. 28, 2020).

(White family wealth 8x black family)

FED. RES. SYS., 2019 SURVEY OF CONSUMER FINANCES, https://www.federalreserve.gov/econres/scfindex.htm (last updated May 20, 2021). (Rental household wealth)

Interfaith and the River of Life Rescue Mission shelters are located there as well as many services (e.g. Corpus Christi House and CATCH (and of course the former Cooper Court)), the City Lights Women's/Children's Center is located on 14<sup>th</sup> and Jefferson

County Crerk

Dear Honorable Chairperson Lakey and Honorable Senators:

My name is Zoe Ann Olson, and I am the Director of the Intermountain Fair Housing Council. IFHC is a nonprofit organization whose mission is to ensure open and inclusive housing for all people, and we serve the whole State. Year after year, realtors, brokers, homebuyers, homeowners, tenants, and reporters contact Intermountain Fair Housing Council about racist and discriminatory language in deeds and CC&Rs concerned that it will affect the purchase or sale of a home denying Idahoans from achieving the American dream.

About two years ago, a homebuyer came into our office and showed us the Covenant, Conditions and Restrictions for a home that he wished to purchase that was part of a homeowner's association. He was shocked and hurt to see that one provision that said, "No persons other than persons of the White race may reside on the property except domestic servants of the owner or tenant," and wondered if he could still purchase the home or have his friends visit. I told him that the CC&R term was illegal and discriminatory under the federal Fair Housing Act and Idaho Human Rights Act, we helped address the language, and he eventually purchased the home. And now Senate Bill SB1240 would allow the homeowner to modify the language themselves without cost.

Even though the Civil Rights Act of 1866, the federal Fair Housing Act and its amendments, and the Idaho Human Rights Act prohibited and prohibit race, color, national origin discrimination in housing transactions and were passed with bipartisan support, the bricks of discrimination still exist as barriers to homeownership and generational wealth creation. Homeownership is an important component of building generational wealth; however, Idahoans of color are more likely to experience housing discrimination, cost burden and struggle to achieve homeownership. For example, Prosperity Now reports that 46% of white renter households in Idaho are cost-burdened compared to 51% of Latino households and 59% of Black households. High housing costs and discriminatory practices prevent families from achieving financial security and broaden the wealth gap among Idahoans.

Community members who have experienced racist language in their deed or covenants and the harm of redlining, discrimination, and segregation because of these practices, now have a mechanism in this proposed law that allows an owner or tenant of property that is subject to one of these racial covenants to record a modification document that specifically voids the racial covenant. The modification document would be part of the deed or chain of title to the property

and would state that the discriminatory language of the racial covenant is void and unenforceable. The beauty of this law like the Civil Rights Act of 1866, Fair Housing Act of 1968 and as amended under President Ford in 1974 and President Reagan in 1988, the Idaho Human Rights Act, is that our legislators, realtors, brokers, title professionals, clerks, civil rights and government leaders, lawyers, community members, homeowners and buyers, renters have come together in bipartisan support to remove one of these bricks of discrimination allowing all Idahoans to be free from this barrier to homeownership. We hope that you will support Idahoans in achieving this dream.

Thank you for your service.

## Ed Labenski

Testimony S1240 Feb 02, 2022 2216 S Toluka Way, Boise, ID 83712 208 985 6220 ed.labenski@gmail.com

My name is Ed Labenski. My wife is Cynthia and we own a home in Warm Springs Mesa in Boise. Our house has one of these restrictive covenants (provisions) in the property record, and I am here to give testimony in support of this bill.

First, I want to thank the Chair and Committee Members for holding this hearing and giving consideration to this bill. Our home was built in 1976 (please take note this date). The provision on racial restrictions for our home, however, dates to 1958. It was attached to our home as a feature of the subdivision, 18 years after it was recorded, and 8 years after the Fair Housing Act deemed these provisions void and illegal. With this bill, this is the first time Idaho homeowners will be able to directly address this issue. In effect, amend and update our property records in a clear and informative way to remove uncertainty and re-enforce valid and well established standards in Idaho law.

I'd like to keep my testimony simple: 1) focus on our personal experience and 2) how this bill will benefit homeowners like us.

In 2018, Cynthia and I were first time home buyers. We were lucky to have our second offer on a home accepted, and in a neighborhood that we loved. The Boise real estate market was very competitive, and we had to act quickly. Our daughter Beatrice was three years old, and this was (at the time) one of the biggest decisions of our lives.

Cynthia and I didn't have access to the full property record until after the bid was accepted, and before the contingency needed to be signed. I remember this experience vividly. I had just read the section on external structures in my CC&R and thought: "I may need to get clarification about the location of the shed on the property." And then I read the following:

<u>Section 23. Racial Restrictions</u>. No part of the real property, or any building site or structure, shall at any time be sold, conveyed, rented or leased, in whole or in part, to any person or persons not of the white or caucasian race. No person, other than one of the white or caucasian race, shall be permitted to occupy any property in said subdivision, or portion thereof, or any building thereon, except a domestic employee actually employed by a person of the white or caucasian race, where the latter is an occupant of such property."

I quickly found Cynthia downstairs with our daughter, and read her this section. And without taking a single breath she turned to me and said: "we cannot buy this home." It was the

night before signing the contingency. Of course, I spent several subsequent hours researching this provision, and learned that it was void and unenforceable. But the initial impact of the language was clear and unavoidable, and it shaped our perception of the home (and the area). We signed the contingency that night, but we knew our involvement wouldn't end. If possible, we would find a way to deal with this issue, and continue to advocate for a community that reflects our values and is welcoming to everyone.

The bill you are considering today is simple, clear, easy to use, and most importantly, effective. In our neighborhood, there is no longer an HOA. There is no vote that can be taken to strike this language from our property documents. Some home owners have attempted to go to court to strike these provisions. But this remedy is costly and time consuming, and is not guaranteed to be successful. The only reasonable remedy for us, and for many other homeowners in our region, is the one we are considering today. Our home has been sold half a dozen times since it was built in 1976. We recently met a BSU Alum who rented our home with two other students in the 1990s. Based on the documentation provided by Prof. Cunningham, it is conceivable that there are hundreds of transactions every year where buyers, sellers, and tenants come into contact with these restrictions for the first time (over and over again).

We have a chance to address this issue today. With your help, we can provide clarity and certainty to these records. We don't have to leave it to skillful guesswork to understand what is valid and enforceable in our property records. These issues were decided long ago. Cynthia and I love our community, and I shudder to think where we would be if we didn't buy our home in 2018 (or if selling our home may raise similar questions about a confusing property record to other qualified home buyers). With this bill, we can bring our property records up to date. We can modify our records in a meaningful and standard way to better reflect the communities we live in today ... the shared feeling and love we have for our neighbor ... and the special status and prominence we give to the law in Idaho.

Many of you have already done so, and I strongly urge this committee to support this bill.

Thank you very much.

Hello Chair, Vice Chair and Committee Members.

My name is Linda Ipaye. My husband is brown skinned, our children are brown skinned, I am a real estate broker, Realtor, business owner and most importantly a human.

Over the last 18 years in the real estate industry I have come across CCR's that have had verbiage that stopped me in my tracks. They contained racist and discriminatory language that made it so that a human with non-'white' skin was prohibited from purchasing, renting or occupying a home! It was something that could affect me and my family. I have 'white' in quotes because as our daughter when she was 5 years old stated so eloquently to a group of adults discussing discrimination, with her hands on her hips said, 'My Dad is dark brown, my mom is light brown and me and my brother are medium brown, we are all just shades of brown!'. From the mouths of babes.

Even though I know this verbiage today would be illegal and unenforceable, that does not mean someone may try to use it to discriminate against another person.

I believe that if 1 human has a right to have something, then all humans do. It seems like a simple statement. Yet, it is not. This discriminatory housing verbiage exists across this nation. Many states have already passed laws to deal with this issue.

It is simple though. The verbiage is hurtful.

Let's do this to make sure discrimination does not happen to anyone in Idaho. I support and ask you to support and pass S1240 and remove discriminatory language from deeds and CC&Rs.

Thank you so much for your time and attention to this matter.

## AGENDA

## SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

## Room WW54 Monday, February 07, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
PRESENTATION:	Idaho Department of Corrections 2022 Update	Josh Tewalt , Director, Idaho Department of Correction
RS 29357	Relating to County Jails - Authorization for Temporary Guard or Private Security Service	Murphy Olmstead, Representing the Idaho Sheriff's Association
<u>61-0101-2101</u>	General Provisions and Definitions - Proposed Rule	Kathleen Elliott, Executive Director, Idaho State Public Defense Commission
61-0102-2101	Requirements and Procedures for Representing Indigent Persons - Proposed Rule	Kathleen Elliott, Executive Director, Idaho State Public Defense Commission
<u>H 444</u>	CORONAVIRUS LIMITED IMMUNITY ACT - Amends 2021 session law to extend a sunset date to July 1, 2023.	Senator Lakey
<u>S 1250</u>	PUBLIC RECORDS - Amends and adds to existing law to provide for public records requests to be made to the custodian of records and provides for the Legislative Services Office to be designated as the custodian for legislative records.	Senator Lakey

Public Testimony Will Be Taken by Registering Through the Following Link:
Register to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERSCOMMITTEE SECRETARYChairman LakeySen ThaynSharon Pennington

Vice Chairman RicksSen ZitoRoom: WW48Sen LodgeSen BurgoynePhone: 332-1317

Sen Lee Sen Wintrow Email: sjud@senate.idaho.gov

Sen Anthon

## **MINUTES**

## **SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Monday, February 07, 2022

**TIME:** 1:30 P.M.

PLACE: Room WW54

MEMBERS Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Lee, Anthon, Thayn,

**PRESENT:** Zito, Burgoyne, and Wintrow

ABSENT/ None

EXCUSED:

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

**CONVENED:** Chairman Lakey called the meeting of the Senate Judiciary and Rules Committee

(Committee) to order at 1:30 p.m. He indicated that due to scheduling issues, the Committee meeting would not follow the Agenda. He stated that **RS 29357** would

be presented first. He indicated that **S 1250** would not be heard today.

RS 29357 Murphy Olmstead, Representing the Idaho Sheriff's Association, presented RS

29357 relating to county jails. Mr. Olmstead explained that this legislation would allow a county sheriff to hire a temporary guard or private security firm to assist in transporting inmates from one location to another, stand guard over prisoners at locations such as hospitals, hospice facilities or long term care when it was required. It allowed the deputy who was assigned to such duties to be available to do more valuable assignments while using the security firm employees to do the less demanding responsibilities. Mr. Olmstead added that the counties would benefit financially from using the lower cost security firm employees while giving the

security businesses more employment opportunities.

**DISCUSSION:** Senator Burgoyne asked Mr. Olmstead several questions relating to the

qualifications of the security firm employees. **Mr. Olmstead** explained that the security officers would not be POST certified nor would they be armed. He stated that many sheriffs already have designated private security services who have

training programs of their own.

MOTION: Senator Lodge moved to send RS 29357 to the floor with a do pass

recommendation. Senator Thayn seconded the motion. The motion carried by

voice vote.

PRESENTATION: Josh Tewalt, Director, Idaho Department of Correction (Department) presented

the 2022 Department Update. **Director Tewalt** stated there were three critical issues for his department and for the people of Idaho. The first issue was the staffing concerns for his department. In fiscal 2021 the Department had the worst staffing crises ever experienced. The Governor's support enabled the Department of Corrections to give pay raises to the prison staff. Starting pay was raised from \$16.75 to \$19.00 an hour. A one time signing bonus for new hires was implemented, to be paid back in 12 months if 12 months of employment was not completed. **Director Tewalt** explained it was important to take care of the current staff. They implemented compression adjustments for all the security staff. A retention bonus program was designed to provide a series of five one time bonuses for security staff through their first five years with the agency. The hope was to encourage employees to make their careers working for the Department. These incentives had helped to increase the number of applicants for open positions.

**Director Tewalt** commented on community supervision and the importance it played for those under the supervision of the Department. The bulk of the population in the prison system was a function of people who had been unable to take advantage of opportunities available to them. The Department recognized that one area needing support was in probation and parole. Significant progress had been made in that area and part of that was due to electronic monitoring systems. They have enabled the parole officers to spend more quality time helping those they work with.

**Director Tewalt** stated that because of support from the Legislature and the Governor, a significant investment was made in intervention stations which were specifically targeted for high risk, high need individuals in the community. The stations had allowed parole officers to recognize when people were struggling and get them out of the communities before they committed a crime. Director Tewalt commented that they had been piloting two programs to help resource the community supervision differently to gain better results. The first was the creation of the Probation and Parole Specialist. These individuals worked closely with newly sentenced probationers or newly released parolees. They provided customer service for the clients who had needs and supported parole officers. **Director Tewalt** explained that the other positive pilot program was creating the new position of Re-entry Specialist. These employees targeted those people who were high risk. In addition the Re-entry Specialists worked for 60 days before the parolees were released, developed a solid case plan and then followed them for 60 days upon release and helped them troubleshoot any issues they encountered. Director Tewalt stated the program was very successful and determined that it was needed in many Idaho communities.

**Director Tewalt** briefly explained the need for infrastructure to care appropriately for the people sentenced to their custody. He mentioned that capacity was not just the number of beds but the number of beds needed to fit specific needs. The Department requested funds to build an 848 bed female facility which would allow 700 minimum custody male beds to be reclaimed for their intended use. The second part of the proposal involved a 280 bed housing unit at the Idaho State Correctional Institution which would include 140 ADA compliant areas.

## DISCUSSION:

**Senator Lee** asked if the amount of funding requested would cover all the costs. **Director Tewalt** responded that he didn't know. He explained that he was looking at compensation from two perspectives. The first was compensating the employees in a way that was commensurate with what was expected of them. The second was compensating them in a way that was commensurate with the value they bring to the criminal justice system that others do not provide. **Director Tewalt** stated he believed they were going to be able to compensate the staff and increase starting pay to continue to be more competitive.

**Senator Lodge** asked what kind of internet access people had in their facilities. **Director Tewalt** explained that it was limited but there are projects underway to increase their access. Some CARES money was used to increase bandwidth. The goal was to have Wi-Fi and internet access available to every bed in the institutions. **Director Tewalt** commented that internet access is a scary proposition in correctional facilities but it was also used for education as well as communication with families. **Senator Lodge** asked how email worked at the centers. **Director Tewalt** said that kiosks and tablets were available for use and were heavily regulated.

## PASSED THE GAVEL

Chairman Lakey passed the gavel to Vice Chairman Ricks for hearing on the Public Defense Commission Rules.

61-0101-2101 AND 61-0102-2101 **Kathleen Elliott, Executive Director, Idaho Public Defense Commission (PDC)**, introduced Chairman Bowles (attending through zoom), Vice Chair Eric Frederickson and Emma Nowacki, Deputy Attorney General of Civil Litigation. **Director Elliott** stated the mission of the PDC was to improve trial level defense to ensure compliance with state and federal regulations.

**Emma Nowacki, Deputy Attorney General**, gave an update on the Tucker Class Action Lawsuit which had challenged the public defense system in Idaho (see Attachment 1).

**DISCUSSION:** 

Senator Burgoyne and Ms. Nowacki had a discussion regarding the costs involved with this case. Senator Burgoyne questioned whether anyone had computed the costs to the State. Ms. Nowacki responded that she did not know. Senator Burgoyne asked Ms. Nowacki to find out how much money this lawsuit had cost the State of Idaho to date. Director Elliot commented that the amount could be estimated.

Director Elliott discussed the last few years of the rulemaking process. In 2019 the PDC negotiated rulemaking but held off proposing new rules to comply with stakeholder's requests. In 2020 there were two more standards to negotiate and the PDC wanted to involve the public in the process. The old rules were moved to new locations and cleanup was done. Director Elliott stated that after many comments and several meetings, the attached legal sheet was produced prior to the 2021 Legislative Session. The sheet shows the end result of each of the 21 provisions that were taken through the negotiated rulemaking process (see Attachment 2). Director Elliott enumerated and explained each provision verbally to the Committee. She stated that all the comments were given in a summary version and given to each committee member. She indicated that the comments, in their entirety, were on their website and were given to the full Commission. The Commission determined what language to keep and how to proceed. The result of that process was what the Commission approved as the pending rules.

**DISCUSSION:** 

**Senator Burgoyne** asked if Director Elliott thought the State provided enough money to the counties so that the rules promulgated could be met. **Director Elliott** stated that in her perspective the State had been incrementally increasing the standards and they have also increased the amount of money allotted. She stated the Commission works very hard to make sure there is enough money available for their needs and that it would appropriately benefit public defense. **Senator Wintrow** asked Director Elliott if the rules, as they were currently printed, were a result of incorporations suggested by the Commission as a body and not just as Director Elliott's interpretations. **Director Elliott** reiterated that the language had to be approved by the Public Defense Commission.

**Senator Anthon** questioned the interplay between statute and the rulemaking process. He stated he did not understand how the PDC could impose qualifications on the counties and still be abiding by the statutes. **Director Elliott** responded there were three elements that came into play. It was necessary to have the structure of the funding, the oversight, and the standards that were nationally recognized. **Senator Anthon** asked questions regarding the removal process from the rosters. **Director Elliott** explained there were two rosters. One was the public defense roster and the second was the capital counsel roster. The public defense roster was a simple application to be completed. **Director Elliott** reiterated that she had never removed anyone from the capital roster. There were people whose grand-fathered terms had expired and at that time they were taken off the roster.

**TESTIMONY:** 

The following people testified or submitted written testimony to reject **Docket No. 61-0101-2101** and **Docket No. 61-0102-2101**: (see Attachment 3).

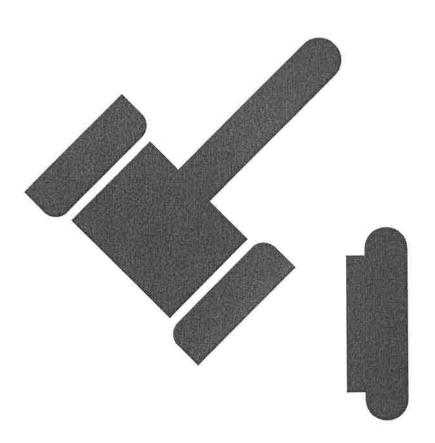
Teresa Molitor, representing The Idaho Association of Criminal Defense Lawyers, testified in person. **Anne Taylor**, Chief Public Defender, Kootenai County, testified in person. ACLU, letter testimony by Lauren Bramwell, Policy Strategist. Jeanne M. Howe, Chief Public Defender, Kootenai County, letter testimony. **TESTIMONY:** Darrell Bolz, Chair, Public Defense Commission, testified by letter in favor of Docket No. 61-0101-2101 and Docket No. 61-0102-2101: (see Attachment 4). **PASSED THE** Vice Chairman Ricks passed the gavel back to Chairman Lakey. **GAVEL ADJOURNED:** There being no further business at this time, Chairman Lakey adjourned the meeting at 3:02 p.m. Senator Lakey **Sharon Pennington** Secretary Chair

# ucker v. Idaho

Looking towards the seventh birthday of the challenge to the system of public defense in Idaho

## Background

- Filed June 2015
- Dismissed and Appealed January 2016
- Reversed and Remanded April 2017
- Class certified January 2018
- Interlocutory appeal March 2019
- Remanded April 2021
- Trial set for October 2023



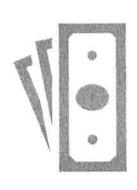
# Tucker Complaint

## lysnes From Allegations

- Lack of representation at initial appearance
- Resulting in unnecessary and extended pre-trial detention
- Excessive caseloads and workloads
- Lack of meaningful communication with client
- Lack of investigation and expert analysis/testimony
- Use of fixed fee contracts
- Lack of independence
- Lack of supervision and evaluation

# Relief Reguested





Deadlines for the State to modify structure to include adequate oversight and funding

Injunction with Court monitoring, including implementation schedule for State oversight and funding

# Relief Reguested

- Appoint an external monitor to supervise public defense system to determine:
- Whether public defenders are present to meaningfully assist and represent indigent defendants at initial appearance
- Whether public defenders are actually absent at any other court appearances after appointment
- Whether public defenders have the time and resources needed to meaningfully seek pre-trial release of their clients, including investigation to prepare for bond setting or bond reduction hearing

# Relief Requested

- Appoint an external monitor to supervise public defense system to determine:
- Whether public defenders are able to promptly and meaningfully respond to client contacts and complaints
- Whether public defenders are fully explaining plea offers
- Whether public defenders are able to adequately fulfill their role as advocate before the court on their client's behalf
- Whether public defenders experience any undue pressure from county commissioners, judicial officers, PDC members or staff, to limit the time and resources committed to indigent defense caseload

# Tucker 1 Appeal

## And the Supreme Sourt

- The State and the PDC have 'ultimate responsibility to ensure that the public defense system passes constitutional muster"
- While delegated to the Counties, "the ultimate responsibility for fulfilling the \_\_\_\_. Constitutional duty cannot be delegated."
- Counties are not "third parties acting independently of the State with respect to public defense."
- "[T]he counties have no practical ability to effect statewide change,
   [therefore,] the State must implement the remedy."

# Current PDC Rules

# County Responsibilities

- Ensure effective representation
- Appropriate sufficient funds
- Provide resources
- Comply with contracting requirements
- Communication re compliance with PDC rules, including workloads and

vertical representation

## Defending Attorney Responsibilities

- Licensed and member of the Defending Attorney Roster
- Apply laws and rules through legal research
- Protect client confidentiality
- Ensure vertical representation
- Dedicate sufficient time
- Investigate case, including requesting funds
  - Consider necessity of an expert
- Presence at initial appearance, including Rule 46 information
- Comply with workload limits
- Identify private meeting space
- Identify conflicts of interest
- Be familiar with criminal law and strategies to employ in defense

# Future Auestions.

Leslie Hayes

Lead Deputy Attorney General - Civil Litigation Division

leslie.hayes@ag.ldaho.gov

208-334-4538

Idaho State Public	Defense Commission
Strike/Reject PDC Pending Rules Approved on March 5, 2021 for Presentation to Legislature	Draft PDC Temporary Rules Approved on March 5, 2021 for Presentation to Legislature
Chapter	1 – 61.01.01
61.01.01.010.22. Vertical Representation, A Defending Attorney appointed to represent an Indigent Person shall, to the extent reasonably practicable, continuously and personally oversee the representation of the client's case through trial proceedings and preservation of right to appeal. For purposes of this definition reasonably practicable means a Defending Attorney will make all efforts to personally represent the client during all substantive proceedings where the facts of the case are discussed by counsel or the Court, including but not limited to advising the Court of any conflict at the time of setting, providing accurate unavailable dates and in the case of unforeseen absences, filing a motion or stipulation to continue.	61.01.01.010.22 Vertical Representation. A Defending Attorncy is responsible for the continuous and personal representation and oversight of an Indigent Person's case, to the extent reasonably practicable, through trial proceedings and preservation of right to appeal. For purposes of this definition reasonably practicable means a Defending Attorncy will make efforts to personally represent the client during all substantive proceedings where the facts of the case are discussed by counsel or the Court, provide unavailable dates at the time of setting and seek continuances in the case of unforeseen absences. The Indigent Person may consent to have another Defending Attorncy appear at a hearing. Each county is responsible to support and provide resources as necessary to ensure Vertical Representation.
Chapter	2 - 61.01.02
61.01.02.020.01.a. Employ or contract with attorneys to provide public defense services from the Defending Attorney Roster or require the attorney to apply for the Roster under Subsection 070.03 of these rules;	61.01.02.020.01.a Employ or contract with attorneys to provide public defense services from the Defending Attorney Roster or if the attorney is not yet on the Defending Attorney Roster, have the attorney complete and submit to the PDC the Roster form within thirty (30) days from the date of their employment or contract under Subsection 070. of these rules;
61.01.02.030.02.a. The county will use an independent committee from within the county or region for recommendations to the Board of County Commissioners for the selection of the lead institutional Defending Attorney or primary contracting Defending Attorneys as the main providers of public defense services as set forth in Sections 19-859 and 19-860(2), Idaho Code; and	61.01.02.030.02.a. Selection Recommendation Committee. The county will use an independent committee from within the county or region for recommendations to the Board of County Commissioners for the selection of the lead institutional Defending Attorney or primary contracting Defending Attorneys as the main providers of public defense services as set forth in Sections 19-859 and 19-860(2), Idaho Code; and
61.01.02.030.02.b. Each judicial district will establish an independent committee of one (1) attorney for each county who practices public defense in or who is familiar or will become familiar with public defense in the county and who is not a Defending Attorney for the appointing county and who is not a prosecutor, to act as a liaison in independence issues between Defending Attorneys and county stakeholders. The Administrative District Judge (ADJ) or Trial Court Administrative (TCA) will identify the members of the committee for their District, and if the ADJ or TCA does not, the Commission will identify committee members,	61.01.02.030.02.b. Independence Working Group. Each judicial district may establish an independent working group of one (1) attorney for each county who practices public defense in or who is familiar or will become familiar with public defense in the county and who is not a Defending Attorney for the appointing county and who is not a prosecutor, to act as a liaison in independence issues between Defending Attorneys and county stakeholders. The Administrative District Judge (ADJ) or Trial Court Administrator (TCA) will identify the members of the working group for their District, and if the ADJ or TCA does not, the Commission will identify group members.
61.01.02.030.05. Independent Contract Review. The county should engage independent legal counsel to negotiate Defending Attorney Contracts.	61.01.02.030.05. Independent Contract Negotiation. The county should consider engaging independent legal counsel to negotiate Defending Attorney Contracts.
61.01.02.040.02. Pay. Defending Attorneys and their staff will receive similar compensation as a properly funded prosecutor and staff with similar experience.	61.01.02.040.02. Pay. So far as is possible, Defending Attorneys and their staff will not be compensated less than properly funded prosecutor and staff with similar experience and performing similar duties.

Page 1 of 4

61.01.02.050.02.a.ii. Inquire about the Defending
Attorney's Workload to ensure compliance with the Public
Defense Rules;

61.01.02.050.02.a.ii. Assess the Defending Attorney's Workload to ensure compliance with the Public Defense Rules;

61.01.02.060.03. Qualifications. Have demonstrated ability, training, experience and understanding regarding representing Indigent Persons and do the following:

- Apply laws, rules, procedures and practices to the case and perform thorough legal research and analysis;
- Protect client confidentiality, and if breached, notify the client and any other entities when necessary to preserve the client's constitutional and statutory rights;
- c. Ensure Vertical Representation from the time a Defending Attorney is appointed in each Case. Defending Attorneys who are unable to comply with this rule will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources;
- d. Dedicate sufficient time to each Case;
- e. Promptly and independently investigate the Case;
- f. Request funds as needed to retain an investigator;
- Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case;
- h. Continually evaluate the case for defense investigations or expert assistance;
- i. Be present at the Initial Appearance and available to the Indigent Person in person or via technology, and:
- Preserve the client's constitutional and statutory rights;
- ii. Discuss the charges, case and potential and collateral consequences with the client;
- Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release;
- iv. Encourage the entry of a not guilty plea at Initial Appearance except in extraordinary circumstances where a guilty plea is constitutionally appropriate;
- j. Work within Caseload or Workload limits, defined in Subsection 060.05 of these rules. If a Defending Attorney's Caseload exceeds the numeric standard, the attorney must disclose this in the Annual Report. The Report must include the reasons for the excessive Caseload or Workload, and if and how the representation met constitutional standards;
- k. Have sufficient time and private space to confidentially meet with Indigent Persons;
- Have confidential and secure information systems for Indigent Person's confidential information;
- Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules;
- n. Be familiar with and competent to identify or use:
- Forensic and scientific methods used in prosecution and defense;
- ii. Mental, psychological, medical, environmental issues and impacts;
- iii. Written and oral advocacy:

- **61.01.02.050.04.** Except as provided in Subsection 050.01.a of these rules, attorneys who are not approved for inclusion on the applicable Roster are not eligible to represent Indigent Persons at public expense.
- 61.01.02.060.03. Qualifications. Have the ability, training, experience and understanding necessary for their appointed Cases to do the following:
- a. Apply laws, rules, procedures and practices to the case and perform thorough legal research and analysis;
- b. Protect client confidentiality, and if breached, notify the client and any other entities when necessary to preserve the client's constitutional and statutory rights;
- c. Ensure Vertical Representation from the time a Defending Attorney is appointed in each Case. Nothing in this rule is intended to prohibit a different Defending Attorney from representing the client at Initial Appearance. Defending Attorneys who are unable to comply with this rule will notify their supervisor, Board of County Commissioners or the Court and request appropriate resources;
- d. Dedicate sufficient time to each Case;
- e. Promptly and independently investigate the Case;
- f. Request funds as needed to retain an investigator;
- g. Request the assistance of experts where it is reasonably necessary to prepare the defense and rebut the prosecution's case;
- h. Continually evaluate the case for defense investigations or expert assistance;
- i. Be present at the Initial Appearance and available to the Indigent Person in person or via technology, and:
- i. Preserve the client's constitutional and statutory rights;
- ii. Discuss the charges, case and potential and collateral consequences with the client;
- iii. Obtain information relevant to Idaho Criminal Rule 46 (bail or release on own recognizance) and if appropriate, seek release:
- iv. Encourage the entry of a not guilty plea at Initial Appearance except in circumstances where a guilty plea is constitutionally appropriate;
- j. Work within Caseload or Workload limits, defined in Subsection 060.05 of these rules. If a Defending Attorney's Caseload exceeds the numeric standard, the attorney must disclose this in the Annual Report. The Report must include the reasons for the excessive Caseload or Workload, and if and how the representation met constitutional standards:
- k. Have sufficient time and private space to confidentially meet with Indigent Persons;
- I. Have confidential and secure information systems for Indigent Person's confidential information;
- m. Identify and resolve conflicts of interests in compliance with Idaho Rules of Professional Conduct (IRCP) and other applicable laws and rules;
- n. Be familiar with and competent to identify or use:
- i. Forensic and scientific methods used in prosecution and defense:
- ii. Mental, psychological, medical, environmental issues and impacts;
- iii. Written and oral advocacy:

iv. Motions practice to exhaust good faith procedural and substantive defenses; v. Evidence presentation and direct and cross examination; vi. Experts as consultants and witnesses and expert evidence; vii. Forensic investigations and evidence; viii. Mitigating factors and evidence; ix. Jury selection methods and procedures; x. Electronic filing, discovery and evidence and systems; xi. Constitutional representation; and xii. Understand their own professional limitations and seek the advice of experienced attorneys or decline appointments when necessary.	iv. Motions practice to exhaust good faith procedural and substantive defenses; v. Evidence presentation and direct and cross examination; vi. Experts as consultants and witnesses and expert evidence; vii. Forensic investigations and evidence; viii. Mitigating factors and evidence; ix. Jury selection methods and procedures; x. Electronic filing, discovery and evidence and systems; xi. Constitutional representation; and xii. When a Defending Attorney's abilities do not match the nature and complexity of the Case, they will seek the advice of experienced attorneys, training, or decline appointments.
61.01.02.060.04.n. Have advanced familiarity and competence with the above minimum requirements for Defending Attorneys; and	61.01.02.060.04.a Have advanced familiarity and demonstrated competence with the above minimum requirements for Defending Attorneys; and as lead appellate or lead post-conviction counsel will meet or exceed the following experience levels:
i. Have an active license to practice law in Idaho; ii. Attest they are in compliance with the Public Defense Rules or will comply with the Rules when appointed and representing an Indigent Person; iii. New attorneys admitted to the Idaho State Bar within the previous year will name and be mentored by an experienced Defending Attorney on the Defending Attorney Roster; iv. Have completed the minimum continuing legal education ("CLE") requirements in Paragraph 090,03 of these rules within the previous year or within the next sixty (60) days of being placed on the Roster; v. Have completed the Defending Attorney Roster application and authorization forms.	61.01.02.070.01. Defending Attorney Roster. a. Attorneys who complete the PDC form verifying they meet the items in this Subsection 070.01 will be automatically included and remain on the Defending Attorney Roster until they request removal or are removed for failing to comply with Public Defense Rules. Attorneys who are unable to verify the items in this Subsection 070.01 may submit a new verification form at any time. i. Have an active license to practice law in Idaho; ii. Attest they are in compliance with the Public Defense Rules or will comply with the Rules when appointed and representing an Indigent Person; iii. New attorneys admitted to the Idaho State Bar within the previous year will name and be mentored by an experienced Defending Attorney on the Defending Attorney Roster; iv. Have completed the minimum continuing legal education ("CLE") requirements in Paragraph 090.03 of these rules within the previous year or within the next ninety (90) days of being placed on the Roster; v. Attorneys on the Defending Attorney Roster will complete Annual Reports as set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraph 020.01a. Attomeys who at the time of inclusion on the Defending Attorney Roster are not under contract with a county will promptly provide PDC Staff notice and copy of any county contracts entered after inclusion.
vi. Attorneys on the Defending Attorney Roster will complete Annual Reports as set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraph 020.01.a. Attorneys who at the time of inclusion on the Defending Attorney Roster are not under contract with a county will promptly provide PDC Staff notice and copy of any county contracts entered after inclusion.	
b. Attorneys who meet the requirements in Subsection 070.01.a. of these rules will be included and remain on the Defending Attorney Roster until they request removal or are removed for failing to comply with Public Defense Rules under written findings of the Executive Director; c. Continuing Eligibility. To remain on the Defending Attorney Roster attorneys must comply with the Public Defense Rules and:	b. Continuing Eligibility. i. To remain on the Defending Attorney Roster attorneys must (a) Comply with the Public Defense Rules and: (b) Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and (c) Have completed an Annual Report. ii. To address Defending Attorney Deficiencies:

i. Have completed the minimum CLE requirements under Subsection 090.03 of these rules; and ii. Have completed an Annual Report.	(a) PDC Staff will review reported Defending Attorney Deficiencies and work directly with the Defending Attorney, and the county when appropriate, to resolve them. (b) If the Deficiency cannot be resolved at the review, PDC Staff may ask the Defending Attorney to submit a plan to cure the Deficiency with proposed detailed action items and completion dates. (c) If a plan is requested and is not submitted or completed, or if the Defending Attorney Deficiency is not cured, it will be referred to the Commission with the Executive Director's order of removal, which the Defending Attorney may appeal as set forth in Subsection 080,04 of these rules. County Deficiencies, which are not Defending Attorney Deficiencies, are the responsibility of the counties and not the Defending Attorney. County responsibilities are set forth in these rules including without limitation Subsection 020. of these rules and subject to the county Deficiency process set forth in IDAPA 61.01.03, "Records, Reporting and Review," Paragraphs 050060.	
61.01.02.070.02.a.jii. Have completed Capital Defending Attorney Roster application and authorization forms.	61.01.02.070.02.a.iii. Have completed Capital Defending Attorney Roster forms.	
61.01.02.070.03. Attorneys Engaged Prior to Roster Membership. Attorneys who are not on the Defending Attorney Roster at the time of employment or contract to provide representation at public expense must apply for Roster membership within thirty (30) days from the date of their employment or contract. Except as provided in Subsection 050 of these rules, attorneys who are not approved for inclusion on the applicable Roster are not eligible to represent Indigent Persons at public expense.		-
61.01.02.080.03.a. To prevent or avoid immediate danger when:  i. An attorney's Idaho license to practice law is suspended;  ii. An attorney is disbarred in Idaho;  iii. An attorney's Idaho license status is inactive; or iv. An attorney is convicted of a serious crime as defined in IRPC 501(p);	61.01.02.080.03.a. To prevent or avoid immediate danger when:  i. An attorney's Idaho license to practice law is suspended;  ii. An attorney is disbarred in Idaho; or iii. An attorney's Idaho license status is inactive;	
61.01.02.080.03.c. An appeal of the removal under Subsection 080.03 of these rules, may be reviewed by the Commission in an emergency proceeding under Section 67-5247, Idaho Code;	61.01.02.080.03.c. An appeal of the removal under Subsection 080.03 of these rules, will be reviewed by the Commission in an emergency proceeding under Section 67-5247, Idaho Code;	
61.01.02.090.01. Approval. CLE credits that meet the requirements in Subsection 090.02 of these rules will count toward minimum requirements. Courses that are not pre-approved by PDC Staff will not be approved in they do not meet these requirements.	61.01.02.090.01 Approval. CLE credits that meet the requirements in Subsection 090.02 of these rules will count toward minimum requirements. Roster members have the option, but are not required, to request advance of approval of a CLE course to confirm the course meets minimum requirements. Courses that are not pre-approved by PDC Staff will not be approved if they do not meet these requirements.	4

# Testimony to Senate Judiciary and Rules committee re: PDC rules **61-0101-2101** and **61-0102-2101**February 7, 2022 Teresa Molitor, Molitor & Associates, LLC representing the Idaho Association of Criminal Defense Lawyers

Mr. Chairman, members of the committee:

My name is Teresa Molitor, and I am a contract lobbyist based here in Boise. I recently began representing the Idaho Association of Criminal Defense Lawyers and I want to tell you what a privilege it is to stand here before you and to speak on their behalf. We are asking that you reject these rules today.

I have distributed a copy of their one-pager explaining the objections, as well as a longer, multi-colored document with specific changes to every section, including: (1) definitions, (2) CLEs, (3) deficiencies, (4) removal from the roster without due process, and (5) excessive bureaucracy. There will be members of our association who will briefly speak to each of these issues today.

The Idaho Association of Criminal Defense Lawyers, also known as "IACDL", is an association of public and private criminal defense attorneys from across the state. It was founded in 1989 and has about 450 members. One of the objectives of the organization is to "promote ... the expertise of the defense lawyer in criminal cases."

Indeed, IACDL has been concerned about the "expertise of the defense lawyer" a full 25 years before the Public Defense Commission was established in 2014. However, the PDC has proposed rules that essentially call into question its confidence in our public defense lawyers and go beyond the scope of the law. Specifically, the PDC has assumed the authority to remove attorneys from capital rosters, monitor and approve Continuing Legal Education classes for public defenders, and essentially micromanage the day-to-day decision-making of our public defenders. This is not acceptable.

We had a productive work session last week – thank you Chairman Ricks for facilitating that discussion between IACDL and the PDC. For the first time, public defenders felt heard. We hope our suggestions for change, which were all well-founded, will be seriously considered.

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Issues of case load, meeting space, vertical representation, and the like, are issues of <u>funding</u>. If those issues are being addressed by the PDC, we applaud that. In the meantime, these additional rules and regulations are unnecessary and go beyond the scope of the law. For instance, we have an Idaho State Bar to decide who is fit to practice and who isn't. The PDC does not need to assume that role.

As the real issues of "inadequacy" continue to be addressed by funding, the PDC has been growing itself into an over-burdensome regulatory agency that is duplicating the roles and functions of other agencies and adding a layer of bureaucracy to this one sector of lawyers. It is putting our public defenders at risk of burnout and making it increasingly difficult to recruit and retain public defenders. Like a dog chasing its tail, these excessive regulations are setting us back and threatening the "adequacy" issues we were working to solve.

In closing, let me say that the IACDL strongly rejects the assertion that public defenders simply "don't want rules." As I pointed out, IACDL has been interested in the "expertise of the defense lawyer" since it began in 1989. If, over the years, the state of Idaho did not properly fund its system, it has an opportunity to catch up now. But adding more regulation to one group of lawyers is absurd and does the opposite of what we all what — it takes public defenders away from their clients as they spend time filing more reports, attending more trainings, and fearing their license could be revoked by the PDC at any time. I don't think that is a situation any of us envisioned for our public defenders.

Thank you for your time. Please reject these rules today.



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# OPPOSITION TO PUBLIC DEFENSE COMMISSION PROPOSED RULES 2022

The IACDL and its membership continue to have great concerns regarding the Public Defense Commission's (PDC) rules propounded during rule making in 2020 and 2021. While the PDC did conduct public hearings and receive stakeholder input since the last legislative session, the input has been largely ignored.

Attorneys practicing public defense are bound by the same rules of professional conduct as every other attorney practicing any kind of law throughout Idaho. Adhering to certain conduct or rules is not what the stakeholder objections are about. The objections are that the rules are vague and centralize authority in an entity, with not a single public defender on it, who does much of its work behind closed doors and without due process. Decisions made about an attorney's conduct which exclude the attorney from rosters are without any formal, meaningful due process. The same is true for counties deemed deficient by the PDC.

# IACDL opposes the PDC proposed rules generally as follows:

- IDAPA 61.01.02.060 Defending Attorney Roster. It is up to the Executive Director and PDC to both approve and remove an attorney from the roster. An attorney can be removed for emergency or non-emergency reasons. An attorney must comply with each and every aspect of the rules to remain on the roster. If an attorney is removed there is no clear appellate process for the aggrieved attorney.
- IDAPA 61.01.03.80.2.a Capital Defending Roster. It is up to the Executive Director and PDC to both approve and remove an attorney from the capital defense roster. An attorney denied admission to the roster or removed from the roster does not have a clear appellate process.
- IDAPA 61.01.03.50.4.b.i Deficiencies. It is up to the Executive Director and the PDC to determine county deficiencies. If there is a finding by the PDC of a willful deficiency, the county does not have a clear appellate process and the process that is specified is different than the process afforded individual attorneys.
- IDAPA 61.01.03.90.1 CLE Requirements. The PDC has the power to disapprove mandatory continuing legal education credits unless they are pre-approved. This pre-approval requirement is extremely onerous for individual attorneys and counties because failure to comply with the mandatory credit requirement by the PDC is deemed a deficiency that must be cured.
- IDAPA IDAPA 61.01.01.22 Vertical Representation. The definition and duties imposed on defending attorneys and counties continues to be an issue that is unsettled.
- PDC rules conflict with Idaho Code and the powers of institutional defender offices to budget, determine who they are hiring as defending attorneys and train. If an attorney is deemed, by the PDC to be deficient, and in jeopardy of roster removal, the PDC works directly with that attorney. The result is that when a county has established an office for Public Defense the PDC rules allow for interference with the relationship between the county, the Public Defender and an employee defending attorney.

I am Anne Taylor. I am a board member of IACDL (Idaho Association of Criminal Defense Lawyers) and chair of the sub-committee of Public Defense. I am the Chief Public Defender for Kootenai County, and an attorney. I became a lawyer in 1998 and have practiced in Idaho since that time. My background is primarily in indigent defense; although I have 6 years experience as a deputy prosecutor in Bannock, Kootenai and Latah counties. As a public defender I worked as a deputy public defender in Kootenai County between 2004 and 2012, then as a private practitioner taking conflict appointments in several counties in Idaho between 2012 and 2017. I have served as the Chief Public Defender for Kootenai County since July 2017.

I am here to ask you to reject the PDC Rules. I wrote in early 2021 asking the rules be rejected. I signed up to testify in the various sessions. I was optimistic when the rules were passed as temporary and there was a promise to have a workgroup convene before the 2022 session. That workgroup did not happen.

I have availed myself of opportunity to comment to the PDC, both verbal and in writing. I have attended negotiated sessions and other meetings requested by the PDC. I attended the special meeting with Senator Ricks and Representative Hartgen (2/2/2022) and appreciate that opportunity to express concerns.

I want you all to know my position is not about having rules to follow. I already follow rules and procedure. I have rules set by ISB, Rules of Professional Conduct, Court Administrative Rules, Local Rules and most importantly, expectation and needs of my client. I understand the Constitutional requirements of my job, and embrace them. I am guided by, and follow, the principles of indigent defense established by the American Bar Association and the National Association of Criminal Defense Lawyers. This is not about rules.

This is about overreach of the PDC with a lack of Due Process for any attorney choosing to practice indigent defense. The Rules place the PDC in position as gatekeeper for who may practice public defense – and that can change without the attorney having any recourse. There is no real process for an attorney removed from a roster, or found deficient.

This power is based in rules that are vague and subject to interpretation. That leaves too much up to a single person with control over an attorney's career and livelihood. This will make it less attractive for an attorney to decide to work in indigent defense.

The rules tread into the purview of ISB and its authority over all attorneys; the rules make indigent defenders subject to an additional level of scrutiny. The rules are contrary to statute.

There are things that have improved public defense – additional funding for more attorneys to reduce workload. The additional funding for case preparation and hiring experts. But these rules take the PDC oversight function and give them authority to say who gets to work in the field of public defense. This will deter experienced, capable attorneys from this field.





Mr. Chair and Members of the Committee:

The American Civil Liberties Union and the American Civil Liberties Union of Idaho (collectively, "ACLU") urge the Committee to reject a number of the Public Defense Commission's pending rules.

The PDC has a duty to promulgate rules related to the provision of indigent defense in Idaho, including establishing comprehensive caseload and reporting standards. These rules, like those they replace, fail to meet that duty. The proposed rules lack specificity and are often permissive rather than mandatory. This approach continues to fail to ensure that indigent Idahoans receive the defense to which they are constitutionally entitled.

## Enforceable Standards

The PDC continues to use language so permissive and vague that some rules are effectively unenforceable and therefore meaningless (i.e., proposed IDAPA 61.01.02.030.05 – "The county should consider engaging independent legal counsel to negotiate Defending Attorney Contracts"). These terms fail to ensure that the counties will comply with the standards or that their non-compliance will be actionable. Whenever prescribing standards, the proposed rules should use mandatory terms, such as "shall" or "must," to provide clarity and certainty to all stakeholders.

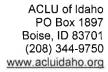
## Vertical Representation (IDAPA 61.01.01.010.22)

The revisions to the former proposed rule appear intended to weaken the vertical representation requirement. To the extent vertical representation is not feasible anywhere in Idaho, the proper response is to ameliorate excessive workloads, lack of independence, or court-imposed and other barriers to vertical representation—not to lessen the standards requiring it.

# Independence (IDAPA 61.01.02.030)

The rules would still give ultimate authority to county commissioners, who are partisan politicians who seldom have legal training, especially in criminal defense (much less public defense). The ABA Ten Principles of a Public Defense Delivery System, and Idaho Code 19-850(a)(vii)(1) in turn, make clear that public defense should be independent from political and judicial influence. As the Ten Principles explicate, a public defense system should be subject to judicial supervision only in the same manner and extent as retained counsel.

The proposed rules regarding the involvement of prosecuting attorneys (IDAPA 61.01.02.030.04–05) are too vague to ensure independence. The rules only require that counties "limit" prosecutors' involvement when it "may jeopardize" independence or undermine the delivery of public defense, and only encourage counties to "consider" engaging independent counsel to negotiate public defender contracts. Involvement of prosecuting attorneys in selecting defending attorneys, or making decisions about defending attorneys' budgets and operations, *always* jeopardizes the independence of defending attorneys and, at the very least, creates the appearance of impropriety, which inevitably undermines the delivery of public defense. Much as it would be inappropriate for defending attorneys





to advise the counties about prosecutor selection, budgeting, or operations, the proposed rules should remove prosecuting attorneys from any involvement in decision-making about public defender selection, budgeting, or operations.

## Equity and Parity (IDAPA 61.01.02.040.02)

IDAPA 61.01.02.040.02 simply weakens and softens the former proposed rule, which was already problematic and ineffectual. The proposed rule is again plagued with vague and amorphous terms that make non-compliance non-actionable (i.e., "So far as is possible, Defending Attorneys and their staff will not be compensated less than a properly funded prosecutor and staff with similar experience and performing similar duties").

More generally—and as we said last year—in light of the constitutional crisis created by the deficiencies in Idaho's public defense system, the PDC should encourage all counties, through its proposed rules and legislative recommendations, to reduce the budgets for and scope and volume of prosecution and incarceration in order to address this urgent (and yet longstanding) crisis.

# Defending Attorney Minimum Requirements (IDAPA 61.01.02.060.03.i (iv))

Previously, this rule provided that defenders were to encourage the entry of a not guilty plea at Initial Appearance except in *extraordinary* circumstances where a guilty plea is *constitutionally appropriate*. The word "extraordinary" has since been stricken at the expense of indigent clients.

Guilty pleas on the first appearance calendar should absolutely be extraordinary. At this stage in a criminal proceeding, public defenders may not have all of discovery or relevant Brady material, nor has the attorney had an opportunity to investigate, consult with experts, or built rapport with their client. For all these reasons, public defenders should be counseling against pleading guilty on the first appearance calendar unless there in the circumstances where a client may be facing felony exposure or a harsher filing if not for the plea. Absent this circumstance, there may instances where a defendant wishes to plead on the first appearance calendar; however, in those cases, the defense attorney must comply with constitutional requirements and their ethical obligations to ensure that their client is knowingly and voluntarily entering the plea, and that the client is fully advised as to why a guilty plea may not be in the his or her best interest in this very early stage in the case. The ACLU of Idaho applauds client-centered advocacy, but representation must be within the constitutional and ethical bounds required of defense attorneys when a client chooses to plead guilty.

# Workload (IDAPA 61.01.02.060.05)

Though the PDC did not invite comments on this draft rule, it is so significant that we must reiterate what we have said before:

The counties have control over public defense caseloads, because it is the counties, through their prosecuting attorneys, that determine whether and when to bring criminal charges. These rules imply that excessive defending attorney workloads are a problem for defending attorneys alone to address, at pain of PDC action against public defense offices and individual defending attorneys. However, the





true causes of excessive workloads are the prosecuting attorneys' offices who bring an excessive number of juvenile and criminal charges, despite limited county resources, and the State's failure to provide funding for a sufficient number of additional defending attorneys.

Furthermore, the workload standards that the PDC adopts in these rules are not well-founded. These numerical standards were based on a number of dubious sources, including (1) the 2018 Idaho Workload Study, the reliability of which both the State and the authors have called into question, (2) data collected by the Ada County Public Defender's office, which has consistently denied the existence of any significant deficiencies in the delivery of public defense services in Idaho, and (3) conversations with various stakeholders—not including indigent defendants or those who have received public defense services in the past. Indeed, the sunset provision built into the Rules suggest that even the State recognizes the need to revisit the workload standard. But the PDC must complete a thorough and reliable workload study expeditiously, rather than waiting until 2023 (or later) to create evidence-based workload standards that allow defending attorneys in Idaho to provide constitutionally-sufficient representation to *all* of their indigent clients. In the meantime, the PDC should use the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") standards, with caveat that even the NAC numbers have been determined by experts in the field to be too high.

The assumptions upon which the numerical standards were based are not accurately reflected in the workload rules, to the harm of indigent defendants' constitutional rights. While the Standards expressly assume cases of average complexity, the numerical standards are based on the assumption that all cases would involve minimal work (low-level charges only, with no trial and minimal investigation): just 4 hours per misdemeanor case and 10 hours per felony case. Though the workload standards prescribe that caseloads should be adjusted to account for more complex cases, the proposed rules provide no instructions for making those adjustments. The rules must include specific guidance for making those adjustments.

The numerical workload standards are also expressly based on a number of faulty assumptions, including (1) that defending attorneys always have adequate support staff, (2) that defending attorneys have no supervisory duties outside of their docket, and (3) that defending attorney caseloads are reasonably distributed throughout the year. But the proposed rules do not define what level of support staff is adequate. The rules should specify what support staff of each type is adequate, as well as how to adjust caseload expectations to compensate for inadequate support staffing. The numerical standards should also require and specify how to adjust for defending attorneys that have supervisory or other administrative duties. Many public defenders have supervisory duties and also handle cases. The rules do not take into account time that many public defenders are required to expend on these roles. The standards also fail to include any process or adjustment for defending attorneys or offices whose caseloads are significantly uneven throughout a given year. Also, in a departure from the existing standards, the proposed rules fail to include any consideration of time defending attorneys spend handling clients in problem-solving courts. The rules must specify the appropriate adjustments for any such workloads.

In the event that defending attorneys or offices are unable to meet the workload standards, the proposed rules only require that the attorneys "request resources" and "notify the court" that caseload maximums are, or might be, exceeded. The rules permit defending attorneys to continue representing indigent defendants and take on additional cases, despite their acknowledgment that their workloads



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are too high and the inherent conflicts of interest present in carrying an excessive caseload. The rules must not allow defenders to take on any representation beyond the maximum workload limits, as adjusted to account for case complexity, support staffing, supervisory duties, and case distribution across time.

However, declining cases is not, alone, enough to resolve the constitutional deficiencies of the current public defense system. While case refusal may resolve ethical issues for defending attorneys, many indigent defendants will remain unrepresented, often while still in custody, until a defender becomes available. The State and the PDC must address excessive caseloads with more than just notification, requests for additional resources, or case refusal.

The comments above highlight some of our main concerns about the proposed rules. But to end Idaho's criminal legal system and public defense crises, the State and the PDC both have substantial additional work to do beyond improving these rules. Even if that additional work came immediately, it would be decades too late. These crises are daily devastating Idaho families' lives, young Idahoans' futures, and Idaho communities' economies and well-being.

Because the proposed rules require substantial revision, we urge the legislature to reject the rules as identified in this letter.

Respectfully,

Lauren Bramwell
Policy Strategist, ACLU of Idaho
Phone: 208-344-9750 x 1204
Email: LBramwell@acluidaho.org

Jeanne M. Howe Chief Deputy Public Defender Kootenai County Public Defender's Office P.O. Box 9000, Coeur d'Alene, ID 83816

Tel: 208-446-1737 Fax: 208-446-1701

February 7, 2022

To Members of the Senate Judiciary & Rules Committee:

My name is Jeanne Howe, I am a Chief Deputy Public Defender in the Kootenai County Public Defender's Office. I've represented indigent clients in Idaho since 2013.

Please <u>reject</u> the current proposed rules before the Committee. I make this request for the logical and simple explanation that as a public defender, I am already subject (at a minimum) to the following governance, oversight and rules:

- My clients
- The Rules of Professional Responsibility (self-governance, colleague oversight and Grievance Procedures through the ISB)
- The Idaho State Bar (MCLE requirements and Grievance Procedures)
- The Idaho Supreme Court
- The Idaho Criminal Rules
- The Idaho Court Administrative Rules
- The Rules of Evidence
- My colleagues

The increased demand on time placed on meeting bureaucratic needs required by the PDC is harmful to the representation of indigent clients, and is frequently redundant and unnecessary.

I am not against rules ensuring effective and competent constitutional representation of indigent clients; but, I am concerned about the proposed rule language before the Committee, and respectfully request you consider rejecting the proposed rules.

The PDC has an opportunity to assist attorneys in constitutional representation of indigent clients in Idaho, and often does assist with resources and training, but my sincere concern is the PDC doesn't become a bureaucratic monolith defeating the purpose it was formed to address. Idahoans don't want to see is a governmental entity govern for the sake of governance (as becomes evident with redundancy), or to justify the existence of a lawsuit.

Thank you for your time and consideration.

Jeanne M. Howe

Mr. Chairman and Committee Members:

Thank you for the opportunity to testify in writing as I am unable to attend in person. My comments today are in reference to the rules proposed by the Public Defense Commission (hereto referred as the PDC).

In last year's legislative session you may recall that the PDC presented a set of rules that were a realignment of the rules as requested by the Governor as an effort to reduce the word and streamline rules statewide. The PDC went through a negotiated rule making process to produce those rules. At the committee hearing there was testimony objecting to the rules as presented. As a consequence, the PDC Executive Director, myself, and the PDC Vice Chair met with the two germane committee chairmen and the Executive of the Idaho Association of Counties. Through that process agreement was reached that the PDC would strike a number of sections in the proposed rules and come back this year with the remainder of the rules and go through negotiated rule making on the section to be stricken. That was done in both germane committees. The PDC followed through on the negotiated rule making of those sections that were stricken during the interim through four (4) meetings. Last week a meeting was held (called by the IACDL) that presented the proposed rules with numerous changes to the proposed rules. I was unable to attend that meeting due to a scheduling conflict (I was not invited by the IACDL, but heard of the meeting by the PDC Executive Director). I only saw the copy their proposed changes following the meeting. I have heard that they desire to oppose adoption of these rules as presented.

I am very concerned about the effect that should these rules, should they not be adopted, will have on the Tucker lawsuit which the PDC and the State of Idaho is and has been facing for some time. By not adopting these rules, I feel that the case against us will only be enhanced. It needs to be noted that the PDC is named in the lawsuit, not the counties individually. In other states individual counties have been named in similar lawsuits. The PDC is and has been working to ensure that indigent defense in Idaho meets the U.S. Constitutional requirement per the 6<sup>th</sup> amendment as well as Article 1, Section 13 of the Idaho Constitution.

I request that the proposed rules be adopted as presented.

Thank you,

Darrell Bolz Chair, PDC

# AGENDA

# SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

# Room WW54

Wednesday, February 09, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
RS 29415	Relating to the Right for Legislature to Intervene in Challenges to Idaho Statutes	Senator Souza
MINUTES APPROVAL:	Approval of January 19, 2022 Minutes	Senator Lodge
MINUTES APPROVAL:	Approval of January 26, 2022 Minutes	Senator Wintrow
INTRODUCTION:	Introduction of Participating Judges	Judge Juneal Kerrick, Senior District Judge, Administrative Office of the Courts
PRESENTATION:	Remote Access to Justice	Honorable Matthew Bever, Magistrate Judge, Canyon County
PRESENTATION:	Language Access to the Courts	Honorable Stacey DePew, Magistrate Judge, Jerome County
PRESENTATION:	Court Innovations in Ada County	Honorable Annie McDevitt, Magistrate Judge in Ada County
<u>H 444</u>	CORONAVIRUS LIMITED IMMUNITY ACT - Amends 2021 session law to extend a sunset date to July 1, 2023.	Senator Lakey

Public Testimony Will Be Taken by Registering Through the Following Link:
Register to Testify

If you have written testimony, please provide a copy to the committee secretary.

COMMITTEE MEMBERS		COMMITTEE SECRETARY
Chairman Lakey	Sen Thayn	Sharon Pennington
Vice Chairman Ricks	Sen Zito	Room: WW48
Sen Lodge	Sen Burgoyne	Phone: 332-1317
Sen Lee	Sen Wintrow	Email: sjud@senate.idaho.gov

Sen Anthon

### MINUTES

# **SENATE JUDICIARY & RULES COMMITTEE**

DATE: Wednesday, February 09, 2022

TIME: 1:30 P.M. PLACE: Room WW54

**MEMBERS** PRESENT:

Chairman Lakey, Senators Lodge, Anthon, Thayn, Zito, Burgoyne, and Wintrow

ABSENT/

Senator Lee and Vice Chairman Ricks (Melissa Ricks Substituted)

**EXCUSED:** 

NOTE:

The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

CONVENED: Chairman Lakey called the meeting of the Senate Judiciary and Rules Committee

to order at 1:30 p.m. Chairman Lakey explained that Senator Souza had another commitment and was not able to present RS 29415 but would do so when she

arrived.

**MINUTES APPROVAL:**  Senator Wintrow moved to approve the Minutes of January 26, 2022. Senator

**Thayn** seconded the motion. The motion carried by **voice vote**.

INTRODUCTION: Judge Juneal Kerrick, Senior District Judge, Administrative Office of the

Courts, introduced the court's strategic roles and objectives. They include timely and impartial case resolution through legally fair procedures, ensuring access to justice, promoting effective and innovative services, and increasing public trust and confidence in the courts. Judge Kerrick introduced the presenters: Judge Matthew Beaver, Canvon County, on remote access to justice: Judge Stacey DePew, Jerome County, on language access to the courts; and Judge Annie McDevitt, Ada County, on court innovations in Ada County (see Attachment 1).

PRESENTATION:

Judge Matthew Beaver, Magistrate Judge, Canyon County, shared the importance of not adding arbitrary barriers to the justice system, but focusing on customer service. Beginning in spring of 2020, the court system began using remote technologies. Attorneys were now able to appear remotely, allowing them to appear for multiple hearings in multiple courtrooms and different courthouses across the state in a single day. This should create a savings to the clients. It's also allowing cases to be scheduled more quickly and move along faster. Defendants can now appear remotely, regardless of where they are, thus reducing logistical slowdowns and costs. The last example impacts the individual litigants involved in cases, in both criminal and civil cases. Traditionally, litigants were expected to be in-person for all hearings, causing logistics issues, time and travel expenses. Remote technology allows the cases to move forward while avoiding some of those unintended consequences. In addition, court trials could be processed in a meaningful way without delay due to health concerns or logistics concerns.

**DISCUSSION:** 

Chairman Lakey asked about the logistics of handling "bulk things" such as Traffic Day and what was handled in person vs. remote. Judge Beaver responded that pre-trial or status conferences were done remotely. The courts are also able to stagger calendars so that people were scheduled to appear during shorter windows of time. For things that must be done in person, the courts will take health considerations into account, but if the facts dictate, there is a preference to do it in person.

A discussion was held among **Chairman Lakey**, and **Senators Burgoyne** and **Wintrow** relating to several aspects of remote vs. in person participation. **Judge Beaver** commented that judges have much discretion in how remote vs. in person was used and zoom meetings were a great improvement over telephones for remote hearings. He stated that remote usage was not available for jury trials and that the constitutional right to a speedy trial was currently suspended by a Supreme Court order.

PRESENTATION:

Judge Stacey DePew, Magistrate Judge, Jerome County, stated that she would be addressing the request for additional funds for language access in the 3rd, 4th and 6th judicial districts. Judge DePew said that the court had a responsibility to ensure that individuals can communicate fully in English regardless of why they are accessing the courts, and there were several federal and state laws relating to that responsibility. Some of the technology and resources that could assist in complying with those regulations were very costly. and some of the small counties have difficulty with those costs. Interpreters who work with the courts undergo specific training and certification requirements to meet the standards set forth by the Idaho Supreme Court. Court interpreters were there to ensure that those appearing before the court could fully communicate and meaningfully participate in the court process. Between March 2021 and September 2021, there were over 8,000 hearings that required interpreters in Idaho, and 43 languages were requested. Zoom had assisted with some of those requests, but it doesn't allow for simultaneous interpretation. The cost for interpreter services continues to increase. Counties try to budget for interpreters, but it takes one case and the need for multiple interpreters, in a language other than Spanish, to completely wipe out a county's budget for these types of resources.

DISCUSSION:

**Senator Lee** commented that although someone may consider themselves proficient in the language, it's incumbent upon our judges to recognize that they may need to offer these services even when someone is not requesting them. **Judge DePew** responded that although there was a cost associated and it may take more time, using interpreters could help improve the process.

**Senator Burgoyne** asked if there was an increasing need for additional language interpreters. **Judge DePew** responded there were very unique languages that required out-of-state interpreters. The judiciary were trying to train in state and encourage certification where they could. She added the more they use certified interpreters and the more education the judiciary had, the more they were able to make the process run smoothly.

**Chairman Lakey** asked how the additional funding would be used at the ground level. **Judge DePew** responded that the funds would be used to cover the additional costs of hiring interpreters when the county budget was gone. In the 6th district, they were utilizing it to cover technology for deaf and hard of hearing individuals.

Chairman Lakey stated Senator Souza would now present RS 29415.

RS 29415

**Senator Mary Souza**, **District 4**, explained that **RS 29415** gives a right for the Idaho Legislature to intervene in legal challenges on any Idaho statute in the future. The Legislature has the right, not the requirement, to intervene in any case questioning the constitutionality or the federal preemption of a statute in Idaho.

MOTION:

**Senator Lee** moved to send **RS 29415** to print. **Senator Thayn** seconded the motion. The motion carried by **voice vote**.

### PRESENTATION:

Judge McDevitt explained the innovations implemented in Ada County. As population had increased, it had become increasingly difficult to ensure a timely resolution of cases. In warrants court, when a defendant fails to appear in court, the court issues a warrant for the defendant's arrest to appear in court at a future date. The new process was that if a defendant misses court, he or she contacts the courthouse or their attorney. Depending upon what time a person called or came in, they could get before the judge on that same day. The Warrants Court involved a judge, a prosecutor and a defense attorney. Everyone got together, discussed the issues, and at that phase some of the cases could be resolved. The benefits of the Warrants Court were that it moves cases forward, which brings finality for both defendants and crime victims. It reduced jail workload and overcrowding and reduced jail costs to society. The next innovation was interdisciplinary settlement conferences, which were geared towards resolving high conflict custody cases without the need for a trial. It was a voluntary process and had been done virtually. It involved the presiding judge, the parties and their attorney, and a neutral attorney and a clinician with experience in child development or other family areas. It was more of an informal process where litigants got to tell their story and talk to a judge outside of a high conflict trial. There was more opportunity to control the outcome through negotiation. It had reduced conflict for the families, and it had saved time for the courts.

## **DISCUSSION:**

**Chairman Lakey** asked questions relating to the warrant courts and interdisciplinary settlement conferences. **Judge McDevitt** stated that judges did have the discretion for someone to participate in warrants court but currently they were only doing misdemeanor cases. Neutral attorneys for the interdisciplinary settlement conferences had been the director of Family Court Services.

**Senator Lee** asked if a court reporter was used for high conflict custody cases. **Judge McDevitt** responded they did not use court reporters, they rely on audio and notes. The cost of court reporters was prohibitive and were only used when they were specifically requested.

**Senator Burgoyne** questioned some aspects of the combination roles of judge and mediator working together in the interdisciplinary settlement conferences. **Judge McDevitt** explained that the litigants were aware that mediation was taking place with the judge. Judges do work to bring parties together and often the parties were very anxious to hear what the judge proposed.

**Chairman Lakey** explained that minutes approval from Senator Lodge would be next on the Agenda.

### MINUTES:

**Senator Lodge** moved to approve the minutes of January 19, 2022. **Senator Wintrow** seconded the motion. The motion carried by **voice vote**.

# PASSED THE GAVEL

Chairman Lakey passed the gavel to Senator Thayn.

## H 444

**Chairman Lakey** explained **H 444** enhances liability protections related to the corona virus and claims against business owners. It provides an enhanced standard for liability instead of negligence. It clarifies that there is no application related to workers compensation. This was another one year extension.

### MOTION:

**Senator Lodge** moved to send **H 444** to the floor with a **do pass** recommendation. **Senator Burgoyne** stated that he opposed limited liability bills and wished to be recorded as voting **nay**. The motion passed by **voice vote**.

# PASSED THE GAVEL

Senator Thayn passed the gavel to Chairman Lakey.

### ADJOURNED:

There being no further business at this time, **Chairman Lakey** adjourned the meeting at 2:40 p.m.

Senator Lakey	Sharon Pennington
Chair	Secretary

Attachment 1

2-9-2022



# House Judiciary, Rules & Administration Committee February 7, 2022

Senate Judiciary & Rules Committee February 9, 2022

# Today's Agenda:

# Introduction

Senior District Judge Juneal Kerrick

# Remote Access to Justice

Judge Matthew Bever, Canyon County

# Language Access to the Courts

Judge Stacey DePew, Jerome County

# Court Innovations in Ada County

Judge Annie McDevitt, Ada County





# REMOTE ACCESS TO JUSTICE

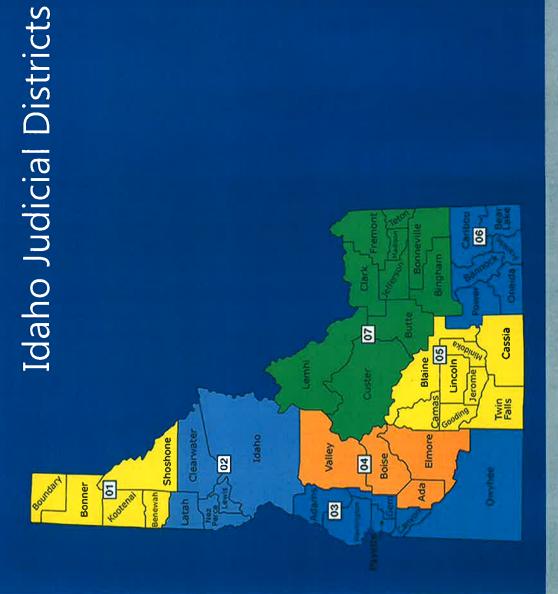
Judge Matthew Bever, Canyon County Magistrate Judge



# LANGUAGE ACCESS TO THE COURTS

Judge Stacey DePew, Jerome County Magistrate Judge





# March 2021 to September 2021

- 8427 hearings required an interpreter
- 43 languages were requested
- 38 of Idaho's 44 counties held hearings requiring an interpreter
- Ada County in the 4<sup>th</sup> Judicial District accounted for 24% of those hearings
- Canyon County in the 3<sup>rd</sup> Judicial District accounted for 22% of those hearings



# The increased need in the 3<sup>rd</sup>, 4<sup>th</sup> and 6th Judicial Districts

- All three districts have seen a significant increase n population in recent years.
- The 6<sup>th</sup> district has one of the highest populations of deaf and hard of hearing individuals in the state.
- The growing population has increased not only the number of hearings requiring an interpreter but also the number of languages being requested.



# 2019 Expenses in Ada County as Example

- 4% increase in need for interpreters in languages other than Spanish
- 25% increase in cost to the 4th District
- 100% increase in need for Swahili interpreters
- 125 % increase in need for American Sign Language interpreters





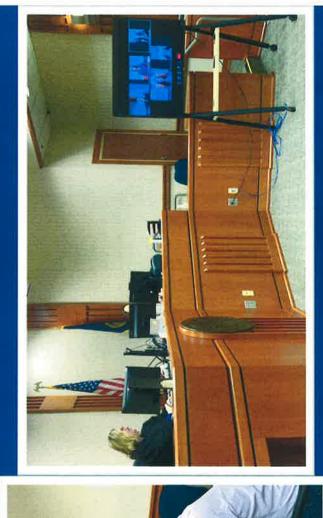
# Court Innovations - Ada County

Judge Annie McDevitt, Ada County Magistrate Judge



# Mission

Provide Access to Justice by Ensuring a Fair Process and the Timely, Impartial Resolution of Cases











Warrants Court is Designed to Quickly get Defendants Back into Court

- Deterrents to Addressing a Warrant:
- Frightening situation;
- Time consuming;
- . Costly;
- Possible loss of job.

# Benefits:

- Moves case forward;
- Finality for defendants and crime victims;
- Reduces jail workload;
- Reduces overcrowding;
- Saves taxpayers' funds.



# Interdisciplinary Settlement Conferences

Resolve High Conflict Custody Cases without Trial

# Process:

- Voluntary process;
- Judge, parties/attorneys, neutral attorney, clinician;
- Informal atmosphere where litigants can tell their story;
- Parties control outcome with feedback from others.





# Benefits:

- Reduces number of cases going to trial
- Better for children
- Reduces conflict
- Reduces future litigation
- Finality sooner
- Cost effective for litigants
- Better use of judicial resources



# Overwhelming Success:

- 48 cases, 81% success rate
- Only 2 have reopened





# AGENDA

# SENATE JUDICIARY & RULES COMMITTEE 1:30 P.M.

# Room WW54 Monday, February 14, 2022

For members of the public to observe the meeting, please click on the following link: https://www.idahoptv.org/shows/idahoinsession/ww54/

SUBJECT	DESCRIPTION	PRESENTER
RS 29503	Relating to Birth Certificates and Adoption Records	Senator Vick
RS 29384	Relating to Assault and Battery Upon Employees of a Public or Consumer-Owned Utility	Senator Woodward
RS 29376	Relating to Sexual Offender Registration	Ashley Dowell, Chair, ICJC, Sex Offense Subcommittee
RS 29377	Relating to Rape to Revise a Provision Regarding Penetration	Ashley Dowell, Chair, ICJC, Sex Offense Subcommittee
RS 29378	Relating to Sexual Abuse of a Child Under the Age of Sixteen Years	Ashley Dowell, Chair, ICJC, Sex Offense Subcommittee
RS 29485	Relating to Sex Crimes	Ashley Dowell, Chair, ICJC, Sex Offense Subcommittee
PRESENTATION:	Overview of Public Defense and National Issues	David Carroll, Executive Director, Sixth Amendment Center
61-0101-2101	General Provisions and Definitions - Proposed Rule	Kathleen Elliott, Executive Director, Idaho State Public Defense Commission
61-0102-2101	Requirements and Procedures for Representing Indigent Persons - Proposed Rule	Kathleen Elliott, Executive Director, Idaho State Public Defense Commission

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COMMITTEE MEMBERS		COMMITTEE SECRETARY
Chairman Lakey	Sen Thayn	Sharon Pennington
Vice Chairman Ricks	Sen Zito	Room: WW48
Sen Lodge	Sen Burgoyne	Phone: 332-1317
Sen Lee	Sen Wintrow	Email: sjud@senate.idaho.gov

Sen Anthon

### **MINUTES**

# **SENATE JUDICIARY & RULES COMMITTEE**

**DATE:** Monday, February 14, 2022

**TIME:** 1:30 P.M.

PLACE: Room WW54

**MEMBERS** Chairman Lakey, Vice Chairman Ricks, Senators Lodge, Lee, Anthon, Thayn,

**PRESENT:** Zito, Burgoyne, and Wintrow

ABSENT/ None

EXCUSED:

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with

the minutes in the committee's office until the end of the session and will then be

located on file with the minutes in the Legislative Services Library.

**CONVENED:** Chairman Lakey called the meeting of the Senate Judiciary and Rules Committee

to order at 1:30 p.m. Chairman Lakey suggested using a motion to send to print

all of the RS's on the February 14, 2022 agenda.

MOTION: Senator Thayn moved to introduce RS 29503, RS 29384, RS 29376, RS 29377,

RS 29378, and RS 29485 to print. Senator Anthon seconded the motion. The

motion passed by voice vote.

PRESENTATION: David Carroll, Executive Director, Sixth Amendment Center, gave a brief

introduction of the purpose and history of the Sixth Amendment Center (6AC). He explained the history of the Public Defense Commission rules and assured the Committee that the rules which have been promulgated in Idaho are consistent with the parameters of the 6th Amendment and are not outside the norms of

other states (see Attachment 1).

**DISCUSSION:** Senators Lee and Wintrow asked Director Carroll what the appeals process was

for counties that are found deficient by the Commission. **Director Carroll** stated that there should be an appeals process and assured the Committee that the process was thoroughly thought through by the early Idaho Legislatures.

**PASSED THE** 

GAVEL

**Chairman Lakey** passed the gavel to Vice Chairman Ricks. **Vice Chairman Ricks** reminded the Committee that the discussion relating to the Public Defense

Commission (PDC) dockets would continue.

DOCKET NOS. 61-0101-2101,

61-0102-2101

Anne Taylor, Idaho Association of Criminal Defense Attorneys and Kootenai County Public Defender concluded her remarks from last week and asked for questions on those remarks. She commented that she agreed with Mr. Carroll's remarks about case load, workload and how important it was to allow public

defenders the ability to do their jobs well. **Ms. Taylor** said her concern with the rules was the lack of due process for attorneys who could be subject to removal

based on decisions by the PDC.

**TESTIMONY:** 

Aaron Bazzoli, Chief Public Defender, Canyon County, assured the committee that his objections, and those of the office he represents, were not based on an overall objection to rules. He stated that the rules presented from last year and this year lack significant protections for the clients, the people they serve across the state, and the attorneys in his charge, saying they remove fundamental due process protections. Mr. Bazzoli added that some of the data referenced in Mr. Carroll's testimony was not fully reliable because of changes in the system and that there was a more accurate tracking system currently in place. He also explained some of the elusiveness in "case counts." He reiterated that due process was important and that there needed to be an appeals process (see Attachment 2).

DISCUSSION:

**Senators Lee, Burgoyne,** and **Wintrow** questioned what Mr. Bazzoli would like to see happen with the PDC rules. He stated he would like to have face to face dialogue so ideas and comments could be responded to. Several questions were asked relating to the Public Defense Commission denying an attorney due process. **Mr. Bazzoli** explained that he was not aware of any violations but he was prohibited from speaking on that matter. He said there was a negotiated rule making process, and the PDC was good about involving them in public hearings.

**Chairman Lakey** questioned the nuanced counting standards. **Mr. Bazzoli** added the counting standards reflect much more than the number represents.

**Senator Lodge** asked what suggestions Mr. Bazzoli had relating to the Tucker lawsuit. **Mr. Bazzoli** responded that he did not believe the Tucker case was as frightening as some thought. He added that the Legislature had done an excellent job in addressing the concerns related to the lawsuit. **Senator Lodge** asked if Mr. Bazzoli would be content with the PDC rules as they were currently. **Mr. Bazzoli** said that he could live with them but he would continue to rally on due process.

**TESTIMONY:** 

Elisa Massoth, Idaho Association of Criminal Defense Lawvers, asked that the Committee oppose the PDC rules because they do not provide due process. The current rules do not set forth the right of criminal defense lawyers to have due process in application for, or removal from, the defending roster. She shared copies of a waiver she had to sign at the end of her application to maintain status on the defense roster (see Attachment 3). She believes the waiver is illegal and that the PDC goes beyond statute. She originally didn't sign the waiver, but when it was sent back, she felt that she had to sign it because she had two death penalty cases and felt pressured into it. Ms. Massoth stated she should not be forced to choose between her own right as a practicing lawyer and those of her clients to have someone fighting for them. She referenced Senator Burgoyne's earlier question, and stated that there was a process, but it's been deemed a "personnel" matter. She believed the involved parties were fighting about what "due process" was because it was not clearly spelled out. Ms. Massoth added executive sessions of the Public Defense Commission were not public. People did not have visibility into what the decision-making process was for whether or not to include someone on the roster. Ms. Massoth stated that the PDC was abusing its power, and assuming power beyond what was given to them in the statute.

**DISCUSSION:** 

**Senator Burgoyne** asked questions relating to due process and the Administrative Procedures Act. **Ms. Massoth** responded that it was unclear because the rules appear in some places and not in others and the processes were not spelled out. She stated there had been a play on words relating to whether someone had actually been removed from the roster. **Ms. Massoth** stated that at times an executive session is appropriate. If decisions were made outside the executive sessions and an appeal was filed, there must be a record. She added that there was a written decision given to the attorney but they were seldom clear about the end result.

**TESTIMONY:** 

Tammy Zoken, Quality and Compliance Counsel, Public Defense Commission, reminded the Committee that stakeholders in such circumstances were not just counties and defending attorneys. They were also citizens who cannot afford an attorney. The role of everyone present was to safeguard the delivery of constitutional representation. Ms. Zokan responded there was an appeals process, and the rules added clarity about what can be appealed. She also reiterated that last year, the PDC did work with stakeholders to try to come to a mutually agreeable decision, including using language that the stakeholders wanted included in the rules. She also stated that when it came to caseloads, there was opportunity for conversation around that, not just a hard and fast rule with no context.

**TESTIMONY:** 

Mark Coonts, Public Defender, Gem County, stated that one of his concerns was although the county is growing, it may be difficult to employ enough contract conflict attorneys willing to work for what the county pays hourly. He mentioned losing a contract attorney because of all the procedural requirements to remain on the public defense roster.

**TESTIMONY:** 

Tony Geddes, Chief Public Attorney, Ada County, stated it had always been challenging in public defense in Idaho to get enough resources, staffing, and expertise in rural counties. He reiterated that the PDC does reject standards for oversight. He said the rules should be rejected because they were confusing and unnecessarily intrusive, with a focus on micro management and bureaucratic red tape, which hinders rather than enhances the delivery of indigent defense. The defending attorney rosters the PDC maintains did not have sufficient due process safeguards in the event someone was removed from the roster. There was also an exclusion of public defender voices. Mr. Geddes added many of the problems with the rules could have been resolved or mitigated by involving actively practicing public defenders. He stated that the negotiated rulemaking process had been awkward and clunky, and that the PDC had not allowed dialogue or discussion. There was talk of a working group last year, and that never happened. He submitted a letter from his Board to the Committee (see Attachment 4.)

Kathleen Elliott, Executive Director, Public Defense Commission, reminded the Committee that they had been there on the same rules. After working on rules and negotiating, she stated that she was surprised that people were upset. They came up with 21 provisions working with stakeholders, but it wasn't negotiated rulemaking, it was a lot of private meetings. Case counting was up for approval again next year, but with COVID, the data is going to be challenging. **Director** Elliott stated there would be a safety valve, where attorneys can state why they were not still meeting constitutional standards. In addition, they were still having challenges getting institutional officers to understand what "active cases" meant. It was not only cases they opened that year, but cases which their attorneys carried over and were working on this year. They were trying to establish methodology and that meant they were counting consistently across the state. There were two rosters: the public defense roster, and the capital council roster. The public defense roster is a simple form to be filled out and various questions answered. The capital council roster focuses on expertise in the area of capital trials. The rules were not perfect, but they were working on it. Director Elliott does believe there was due process in the rules..

MOTION:

Senator Burgoyne moved to approve Docket No. 61-0101-2101. Senator Wintrow seconded the motion.

AMENDED MOTION:

Senator Burgoyne moved to approve Docket No. 61-0101-2101 and Docket No. 61-0102-2101. Senator Wintrow seconded the motion. The motion passed by voice vote.

GAVEL	Vice Chairma	an Ricks passed t	the gavel back to	o Chairman Lakey.	
ADJOURNED:	There being p.m.	no further busine	ss <b>Chairman La</b>	akey adjourned the meeting at	3:00
Senator Lakey				Sharon Pennington	
^hair				Secretary	

# Idaho Senate Judiciary Committee Hearing on Public Defender Commission Rules February 14, 2022

\*\*\*\*

Good morning. I am David Carroll the Executive Director of the Sixth Amendment Center (6AC). For those of you who are not familiar with me, the 6AC is a non-profit, non-partisan organization created to assist policymakers to meet their state's constitutional obligation to provide effective representation to the indigent accused at all critical stages of criminal and delinquency proceedings that carry a potential loss of liberty.

Although the 6AC was founded in 2013, I have been providing public defense technical assistance in one form or another for over 25+ years. In that time, I have been to 49 of the 50 states. Prior to founding the 6AC, I worked for the National Legal Aid & Defender Association (NLADA) and wrote the 2010 evaluation that focused the Idaho legislature to consider indigent defense improvements.

# The 6AC is founded on the principles that:

- 1. We never get involved in litigation of indigent defense systems neither individual cases, class action lawsuits, nor even filing amicus briefs in other organizations' litigation. That is, we do not want policymakers fearing that seeking out answers to their constitutional obligations will lead to litigation.
- 2. We never go where we are not invited. My subsequent involvement in legislative hearings that led to the creation of Idaho's public defender commission was at the request of your legislative leaders at that time. Today, I am providing technical assistance today at the request of Chairman Lakey.
- 3. We are truly non-partisan. Our Board represents viewpoints from across the political spectrum and our funding comes from both the left and the right. So for every dollar we get from a philanthropic house like the Public Welfare Foundation, we get similar funding from the Charles Koch Foundation (now known as Stand Together). Indeed, over the prior four years, the most funding we received came from the Trump Administration where I was an approved provider of technical assistance on behalf of the DOJ.

The reason for my insistence on a non-partisan approach is that the right to counsel is a uniquely American ideal that pre-dates the founding of our country. You see the adversarial system of justice is rooted in the very fabric of our nation. Because many of the people who arrived on the shores of America had been subject to persecution in the courts, the people of the new emerging nation were not content to adopt the justice systems of their mother countries. Having experienced tyranny firsthand, the people of the new American colonies were suspicious of concentrated power in the hands of a few. An individual's right to liberty was self-evident, and therefore there needed to be a high threshold to allow government to take away the liberty that the

Creator had endowed in each and every individual. Even before the American Revolution, American courts were appointing defense attorneys for the accused. Even before there were professional prosecutors, there were criminal defense attorneys for the accused. The very first right to counsel statute in what would become the United States comes from Rhode Island in 1660.

Once Americans threw off the shackles of a tyrannical monarchy in the Revolution, the patriots were not about to create a new government that could infringe on the rights of individuals. Thus, the framers of the U.S. Constitution created a Bill of Rights to specifically protect personal liberty from the tyranny of big government. All people, they argued, should be free to express unpopular opinions, or choose one's own religion, or take up arms to protect one's home and family, without fear of retaliation from the state.

Preeminent in the Bill of Rights is the idea that no one's liberty can ever be taken away without the process being fair. That is, to protect against the tyrannical impulses of government, the country's founders devised an adversarial justice system that consciously made it difficult for government to put someone in jail or prison. A jury made up of everyday citizens, protections against self-incrimination, and the right to have a lawyer advocating on one's behalf are just a few of the antityranny ideals enshrined in the first ten amendments to the United States Constitution.

Indeed, the right to counsel in Idaho pre-dated its own statehood (1890). The Idaho 1874 Territorial Criminal Practice Act § 3 conferred on defendants the "right to the aid of counsel in every stage of the proceedings and before any further proceedings are had." The same Act continued that it is a defendant's right to have counsel "before being arraigned." This meant that if the defendant wished an attorney, and one was not present in the courtroom, "the magistrate had to adjourn the examination and send a peace officer to take a message to the attorney within the township or city as the defendant may name."

In 1887, Idaho Revised Statutes added a new wrinkle: "If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him." (emphasis added.)

There the right to counsel stood in Idaho until 1923, when the Idaho Supreme Court, in State v. Montry, 37 Idaho 684 (1923), determined: "It is the policy of this state... to accord to every person accused of crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In a case of indigent persons accused of crimes, the court must assign counsel to the defense at public expense."

Four years later, the Court overturned a 1<sup>st</sup> degree murder conviction and life sentence based upon ineffective assistance of counsel in State v. Poglianich, 43 Idaho 409 (1927). Foreshadowing the case of Clarence Earl Gideon, Mr. Poglianich too was acquitted of all charges at a second trial six months later.

So, with all this history, why is there so much fanfare about the 1963 case of Gideon v. Wainwright? You see *Gideon* is not just a 6<sup>th</sup> Amendment case; it is also a 14<sup>th</sup> Amendment case. That is, states are require by the 14<sup>th</sup> Amendment to ensure that the 6<sup>th</sup> Amendment is properly implemented.

The 2010 NLADA report my colleagues and I wrote found that the State of Idaho could not meet their 14<sup>th</sup> Amendment obligation to provide effective 6<sup>th</sup> Amendment services because there was no state entity charged with setting rules and standards to ensure that county governments can carry out the anti-tyranny ideals of due process. Moreover, the report found that there were great systemic deficiencies throughout the state.

For example, the NLADA report states that: "If it were possible to evaluate the overall health of a jurisdiction's indigent defense system by a single criterion, the establishment of reasonable workload controls might be the most important benchmark of an effective system. Yet none of the studies counties have any workload controls in place."

"In Bonneville County: A single attorney is assigned to handle more than four fulltime attorneys' worth of work – and a caseload that allows only one hour and ten minutes per defendant."

"In Canyon County: Attorneys handling misdemeanor and juvenile cases averaged 954 cases per year" per attorney.

The Idaho Public Defense Commission was statutorily created to make indigent defense services independent and to enforce oversight. Here, Idaho needs to be explicitly commended. When the NLADA report was released, there were 14 states with no indigent defense commissions. Today, there are only 7. Indeed, I can draw a direct line from how Idaho's changes impacted the states of Nevada, Utah, and California. So, I thank the Idaho Legislature for their leadership in helping these other states.

So, all of that is a long introduction to the PDC rules. I can say with confidence that the rules that have been promulgated in Idaho are consistent with the parameters of the 6th Amendment and not outside the norms of other states. If anything, the PDC rules are conservative compared to other states. For example, the PDC caseload policies indicating that an attorney can handle no more than 210 non-capital felonies per year or 520 misdemeanors is significantly above your neighbor Oregon's limits of 150 felonies or 300 misdemeanors. And, lest someone think that Oregon is an anomaly, Montana has a complex workload system in which all lawyers

track their time (an idea Idaho should consider) that allows felony attorneys to handle no more than 80-100 non-capital cases per year and 200-240 misdemeanors per year.

So, the question becomes, since the Idaho Public Defense Commission has promulgated its rules in a transparent and inclusive way that is ensuring the state's obligation under the 6th and 14th Amendments (albeit in conservative fashion), why then all the focus on changing the rules today? In my 25+ years of working all across the country, I can say with certainty that the last people standing against such good governance are, typically, a small cross-section of the criminal defense bar that simply does not want oversight. I have not spoken with the Idaho attorneys who are recommending changes here today, so I cannot say that my national perspective is indicative of what is happening here, but nationally criminal defense lawyers often have figured out how to put food on their families' tables under the old ways and do not want change. This, even though lax supervision has resulted in the state being sued by the ACLU.

In closing, let me point to one suggested change that could increase Idaho's exposure to litigation. Proposed changes to the "minimum requirements for capital defense teams" want to allow defense attorneys to *only consider* putting together a team comprising a fact investigator and a mitigation specialist, rather than requiring it. The requirement for such a team comes directly from the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. Guideline 4.1.A.1 states: "The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist." I cite this ABA standard – not because the ABA has any holding over this legislative body – but because the Supreme Court says in Wiggins v. Smith, 539 U.S. 510 (2003) and other cases to look to precisely these ABA standards to determine what is reasonable professional judgment under *Strickland* in providing necessary investigations into mitigating evidence.

In my professional opinion the PDC's existing rules are reasonable. I am happy to take any questions and provide on-going technical assistance to this august body. Thank you.

# Aaron Bazzoli CANYON COUNTY PUBLIC DEFENDER OBJECTION TO PASSAGE OF PUBLIC DEFENSE COMMISSION RULES

Members of the House Judiciary and Rules Committee:

We are here again this year objecting the passage of the suggested Rules under the first and second sections by the Idaho Public Defender Commission.

This objection is not based upon an aversion to rules or because we do not believe that standards, guidelines, and rules. Also, this is not a criticism of the PDC or their staff who work incredibly hard and the Commission members who volunteer their time. We are here again this year because the rules which were presented last year and this year lack significant and compelling protections for the clients that we serve across the State and the attorneys in our charge.

These rules continue to remove or ignore fundamental due process protections including the opportunity to be heard and participate in any removal or denial from either the proposed public defender roster or Capital Defense Roster. The right to appeal the decision is written in but ends there. The right to be present at any hearing, to know why, to answer the questions or challenge the information is entirely absent including time frames. The PDC will have absolute authority of every single attorney who practices public defense with no oversight or meaningful right to appeal any decision they make. This is unacceptable and must be changed.

The workload and caseload requirements continue to be elusive and continue to create an unworkable calculation which is unrealistic of the actual work that public defenders are doing and time spent in our cases.

We all follow the mandates of our bar licenses under the Idaho Rules of Professional Conduct; if we fail to follow those mandates, we will lose our license to practice law. If there is a bar complaint, the process is clear and provides multiple steps, appeals, investigations and hearings with the aggrieved attorney advised of the allegations and statements against them and an opportunity to explain and rebut. Under these rules the PDC can decide that an attorney is not qualified to practice indigent defense without any of the above protections.

These rules must be rewritten and I suggest that a work group be made by the PDC with stakeholders including clerks, commissioners, contract and institutional public defenders and members of the Idaho Legislature sitting together and NEGOTIATING the rules into a workable solution which protect the indigent of Idaho facing the weight of criminal prosecution or child protection actions as well as those that commit their skills in the service of indigent defense.

The process that has been followed, the "negotiated rule making" has been more of a monologue than a dialogue. Many of us participated publicly and privately, and then very little is changed. The PDC did make some minor, rather trivial changes.

What we want is a seat at the table, to bring to you next year a working and fair set of rules, created with the voices of all stakeholders through a work group where a meaningful dialogue ends in a year from now those of us sitting here today encouraging you to adopt these rules.

These rules to not accomplish or effectively support public defense and/or public defenders, money can help reduce case load management, giving attorneys fewer cases but the rules as presented exceed the already established statutory requirements under Idaho Code 19-850 and do not reflect the needs of the key stakeholders, do not protect due process and fail to further public defense in Idaho.

Thank you for your consideration.

# CERTIFICATE

To the Idaho State Public Defense Commission:
(Initial) 1. I authorize all persons, firms, officers, corporations, organizations, associations (including Bar Associations of other jurisdictions) State or Federal agencies and institutions to furnish to the Public Defense Commission and its staff ("Commission") and any of its representatives, all relevant documents, records or other information that may be requested in investigation of this continuing eligibility form.
(Initial) 2. I authorize the Commission and any of its representatives to consult with any persons who may have information relating to my professional qualifications, credentials or character, ethics, behavior, or any other matter reasonably bearing on the criteria for initial and continued review of my qualifications to serve as capital counsel. I further agree that all information received by the Commission and any of its representatives shall be treated confidentially and that I have no right of access to information received by the Commission and any of its representatives from third parties. I specifically waive any right to review any reference or other evaluations made to the Commission and any of its representatives, whether solicited by the Commission and any of its representatives or me. In addition, I agree not to seek discovery of such references and evaluations, formally or informally, in any legal proceeding or otherwise.
(Initial) 3. I release, discharge and exonerate the Commission and its members, agents and representatives, and any person furnishing information and evaluations to them, from any and all liability of every nature and kind arising from the investigation and evaluations of my continuing eligibility form.
l,, being first duly sworn, state that:
I am the applicant who has signed this continuing eligibility form for the placement of my name on the roster of defending attorneys who have been determined to be qualified to represent indigent defendants in capital cases maintained by the Commission in accordance with Public Defense Rules promulgated by the Commission. By signing this continuing eligibility form, I certify that I have fulfilled the requirements of said rule for placement on the Capital Defending Attorney Roster in the category under which I have applied. If I have not completed required training, I certify I will attend a Commission-approved capital trial training program prior to approval. I further certify that I am familiar with and agree to comply with Public Defense Rules, and that I am familiar with and will utilize the performance standards in the current American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.
I fully realize that the determination as to whether I am placed on the Capital Defending Attorney Roster depends on my demonstrated qualifications to provide effective counsel to indigent defendants in capital cases and the truth and completeness of my answers as set forth in this continuing eligibility form and any statements attached. To my knowledge, the answers and information which I have supplied in connection with this continuing eligibility form are true and complete. I understand the Commission may require me to provide additional information in support of my continuing eligibility form.
Applicant's Signature
Date

[Notary Certificate on next page]



# ADA COUNTY

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January 25, 2021

Via Email: <a href="Mailto:GChaney@house.idaho.gov">GChaney@house.idaho.gov</a>; <a href="LHartgen@house.idaho.gov">LHartgen@house.idaho.gov</a>; <a href="RKerby@house.idaho.gov">RKerby@house.idaho.gov</a>; <a href="PAmador@house.idaho.gov">PAmador@house.idaho.gov</a>; <a href="Mailto:BEhardt@house.idaho.gov">BEhardt@house.idaho.gov</a>; <a href="Mailto:HSContalongov">HSCott@house.idaho.gov</a>; <a href="Mailto:JYoung@house.idaho.gov">MErickson@house.idaho.gov</a>; <a href="Mailto:Mailto:Mailto:Nationalongov">MErickson@house.idaho.gov</a>; <a href="Mailto:Bhouse.idaho.gov">MErickson@house.idaho.gov</a>; <a hr

The Honorable Greg Chaney

The Honorable Linda Wright Hartgen

The Honorable Ryan Kerby

The Honorable Paul Amador

The Honorable Barbara Ehardt

The Honorable Heather Scott

The Honorable Gary L. Marshall

The Honorable Caroline Nilsson Troy

The Honorable Julianne Young

The Honorable Ron Nate

The Honorable David M. Cannon

The Honorable Marco Erickson

The Honorable Bruce D. Skaug

The Honorable John Gannon

The Honorable John McCrostie

The Honorable James D. Ruchti

The Honorable Colin Nash

RE: Ada County Concerns Regarding Pending Public Defense Commission Rules Dated December 2, 2020

Dear Chairman Chaney, Vice-Chair Hartgen, Representative Kerby, Representative Amador, Representative Ehardt, Representative Scott, Representative Marshall, Representative Troy, Representative Young, Representative Nate, Representative Cannon, Representative Erickson, Representative Skaug, Representative Gannon, Representative McCrostie, Representative Ruchti and Representative Nash:

The Board of Ada County Commissioners appreciates the opportunity to offer feedback on the Idaho Public Defense Commission ("PDC") pending rules. For the reasons set forth below, the Board respectfully requests that you reject the pending rules and direct that the rule first undergo a negotiated rulemaking process.

# I. The Idaho Legislature Did Not Give the PDC Authority Over County Budgets

The Idaho Code gives the PDC the authority to set standards for defending attorneys and provide funding to meet those standards. The Idaho Code does not give the PDC authority over county budgets or county spending.

Boards of county commissioners are elected to serve as chief executive authority of the county government. I.C. § 31-828. Importantly, boards of county commissioners are responsible for managing county property and adopting the county budget. I.C. §§ 31-807, 31-1604, & 31-1605. As part of that obligation, "each county shall annually appropriate enough money to fund the indigent defense provider" selected. I.C. § 19-862(1). The PDC's pending rules diminish the important statutory budgetary obligation of county commissioners throughout the state.

The PDC's pending rules generally require counties to "[a]nnually appropriate enough money to fund [its] public defense model..." IDAPA § 61.01.02.020.01 (Dec. 2, 2020). In spite of boards' budgetary authority noted above, the rules allow the PDC to determine, in its sole authority, whether a board's budgetary determinations sufficiently fund public defense. The rules define "Deficiency" vaguely as "[t]he noncompliance with any Public Defense Rule by a county..." Id. at § 61.01.01.010.11. The rules allow PDC Staff to report deficiencies. Id. at § 61.01.03.050.01. Thus, if the PDC is displeased with a board's budgeting decisions, it can unilaterally require that county to resolve the "Deficiency." See Id. at § 61.01.03.050.02-05. If the county refuses to alter its budget, the rules vest the PDC with power to "contract with contract Defending Attorneys or other resources as deemed appropriate [by the PDC] to remedy to remediate at the county's expense." Id. The Idaho Legislature vested boards of county commissioners with county budgeting authority. See Idaho Code Title 31 Chapter 16. Notably, the Idaho Legislature has not authorized the PDC to undermine this authority via the PDC's rulemaking authority.

Furthermore, as noted briefly above, Idaho law already requires boards of county commissioners to adequately fund public defense. Boards of county commissioners are responsible for "establish[ing], maintain[ing] and support[ing]" the office of the public defender. I.C. § 19-860. Additionally, boards are required to "[p]rovide appropriate facilities including office space, furniture, equipment, books, postage, supplies and interviewing facilities in the jail, necessary for carrying out the public defender's responsibilities" or "[g]rant the public defender an allowance in place of those facilities." *Id.* However, the statutes do not require counties to "[e]nsure resources for compliance with Public Defense Rules" as pending rule 61.01.02.020.01.c states. It is our understanding that through the grant program, the state is providing the funds for compliance with the PDC rules. It is inappropriate for the rules to require more than the statute.

In addition, the rules noted above exceed the scope of the PDC's rulemaking authority. Per Idaho Code § 19-850(1)(a)(vi), the PDC is vested with authority to promulgate rules establishing "[p]rocedures for the oversight, implementation, enforcement and modification of indigent defense standards so that the right to counsel of indigent persons... is constitutionally delivered to all indigent persons in this state." The statute further clarifies that the PDC is to "[r]eview indigent defense providers and indigent defense standards and the terms of state indigent defense financial assistance." I.C. § 850(1)(c) (emphasis added). The rules do not provide the PDC with county budgeting authority, but rather, with the ability to withhold its PDC grants as an enforcement mechanism. The rule, as written, exceeds this authority.

# II. The Idaho Legislature Did Not Give the PDC Authority Over County Hiring and Termination

Similarly, the rules undermine counties' employment decisionmaking. The pending rules exceed the Idaho Legislature's grant of authority by altering the statutory manner by which public defenders are selected. The Idaho Code already sets forth the manner by which public defenders are to be selected. Specifically, Idaho Code § 19-860(2) provides that the Administrative Judge will convene a panel of lawyers from the judicial district who will make a recommendation of 3 to 5 candidates to the Board of County Commissioners. The PDC, through the pending rule, attempts to change the statute, and limit the Board of County Commissioners employment decisions. Pending rule 61-0102-2002.030.02 requires the county to use an independent committee from within the county or regions for a recommendation. Per the pending rules, the independent committee is established by the judicial district and must include one attorney from each county in the judicial district AND cannot include any public defenders who work for the County making the selection. If members of an independent committee are not identified, the PDC will determine the independent committee members. This makes no sense for Ada County. The largest number of lawyers reside in Ada County yet the pending rules are requiring an independent committee with members from Elmore, Boise and Valley counties.

The rules also take employment authority from the public defenders over their staff. When reviewing pending rules, it is always helpful to review the statute that was enacted by the Legislature to ensure that the rules comport with the statute. Idaho Code § 19-861 provides that the public defender may employ assistant public defenders in the manner that the public defender chooses and further provides that the assistant public defenders serve at the pleasure of the public defender. In other words, in an institutional public defense office, the public defender holds sole supervisory authority over his/her operations. Once selected, the Idaho Code states that the chief public defender is responsible to hire employees, and all employees "serve[] at the pleasure of the public defender." It is not the board, but rather, the chief public defender, with ultimate supervisory authority over his/her employees.

Pending Rule 61.01.02.070.01 appears to conflict with the statute and diminishes the public defender's ability to supervise his/her employees. However, the rules give some of that authority to the PDC. The rules allow the PDC to remove attorneys from the roster—thereby prohibiting them from providing public defense in the state—"for failing to comply with Public Defense Rules under written findings of the Executive Director." IDAPA § 61.01.02.070.01.b. Thus, under this rule, a licensed attorney in the state of Idaho that has been hired by the public defender can be, in essence, terminated by the PDC.

Additionally, the rules state that "[a] Defending Attorney exercising their professional or ethical obligations or advocating for policies supporting constitutional representation of Indigent Persons is not cause for discipline or termination." IDAPA § 61.01.02.030.03. By limiting the chief public defender's supervisory authority in this manner, the PDC may actually prevent disciplinary proceedings against employees who are *inadequately* advocating for Indigent Persons. The chief public defender in any institutional office is in the best position to determine whether a member of his/her staff is representing indigent persons in an appropriate and sufficient manner because the chief actually sees the attorney practicing law. It appears that the PDC attempted to allay this concern in its redraft of the rule by adding the following language: "Nothing in this Subsection. . . is intended to prohibit the discipline or termination of a Defending Attorney who has violated county employment policy or Idaho Rules of Professional Conduct." *Id.* Even with this addition, the rule still does not allow public defenders to take disciplinary

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action or terminate a public defender who does not appear to be effectively performing his/her role as advocate. While it may not amount to an employee policy violation, it is certainly cause for concern, and public defenders should remain empowered to make the best decision for their offices and for the indigent defendants served by them. Idaho is an at-will state—an employee's tenure of employment may be terminated at the will of either the employer or the employee.

In addition to the above, the above-mentioned rules intrude on the province of the Supreme Court of Idaho, which is vested with the authority to determine who may be licensed to practice law in the state of Idaho, through the Idaho State Bar. Further still, these provisions impinge on courts' ability to appoint counsel for the indigent accused. The Idaho Legislature authorized courts to appoint an attorney to represent an indigent person if "he is licensed to practice law in this state and is otherwise competent to counsel and defend a person charged with a crime." I.C. § 19-855. These rules will no longer allow courts to appoint individuals who meet these qualifications. The authority to determine who may practice law in Idaho properly belongs to the Idaho Supreme Court, Idaho State Bar, and Idaho judiciary, and it should not be transferred to a single person—the PDC Executive Director—with regard to public defense attorneys.

# III. The Idaho Legislature Did Not Give the PDC Authority to Interfere With the Attorney-Client Relationship Between Counties and Their Legal Counsel

Idaho Code § 31-2604(3) gives the prosecuting attorney the authority "to give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers." Further, Idaho Code § 31-2607 makes the prosecuting attorney "the legal adviser of the board of commissioners; he must attend their meetings when required, and must attend and oppose all claims and accounts against the county when he deems them unjust or illegal."

Pending Rule 61.01.02.030.05 attempts to change the statute by rule. The rule states that a "county should engage independent legal counsel to review and negotiate Defending Attorney Contracts." According to the statutes, the review of civil contracts is the province of the board's attorney. And if there is a conflict, the Rules of Professional Responsibility require the prosecuting attorney to direct the board to seek outside representation. See I.R.P.C 1.7(a) and (b). The board setting a sum for a public defense contract does not create a conflict. The board's legal counsel is merely acting at the direction of the client.

# IV. Other Rules that Exceed Rulemaking Authority

In addition to the above-noted concerns, the rules also exceed the PDC's rulemaking authority in other ways.

For instance, the rules exceed the PDC's statutory authority in requiring counties to ensure defending attorneys meet the indigent defense standards. Idaho Code 19-850(c) requires defending attorneys to meet the indigent defense standards. Indigent defense standards are a minor part of the pending rules yet the pending rules state that the counties must be in compliance with all PDC rules and must provide resources to be in compliance with all PDC rules 61-0102-2002.020.01.c. The Idaho Code allows the PDC to promulgate rules to ensure defending attorneys' compliance with the standards; it does not authorize the PDC to promulgate rules to regulate county compliance. In fact, the Idaho Code merely requires counties to "cooperate and participate" with the PDC in review of the services a county is providing. I.C. § 19-862A(1).

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As further evidence of this, the indigent defense standards obligates defending attorneys to be independent of political or judicial influence. The pending rule goes one step further than contemplated by the statute—it requires counties to "ensure public defense is independent of political and to the extent possible judicial influence." IDAPA § 61.01.01.20.02.030. The statute did not authorize the PDC to obligate counties in this manner.

In addition, the pending rules allow the PDC to determine whether counties are meeting existing statutory obligations outside the PDC's rulemaking authority. Under Idaho Code § 19-850(a)(vii)(7), there must be reasonable equity between prosecutors and public defenders in resources, staff and facilities. Pending Rule 61.01.02.20.02.040 provides that "counties will provide adequate and equitable resources for public defense consistent with a properly funded prosecutor." The rule goes on to require "equal access to quality staff and facilities," "similar compensation," "equal access to resources," a "frequent[] review by county to assess equity between" the two offices, and "adequately budget" to meet needs of defending attorney. This leaves the determination of whether counties are meeting their obligation under Idaho Code § 19-850(a)(vii)(7) up to the PDC and allows the PDC to determine what a "properly funded prosecutor" is—another area where the PDC has the power to increase county funding.

# V. Conclusion

Thank you for the opportunity to provide feedback on the pending rules. Based on the above concerns, the Board of Ada County Commissioners respectfully requests that this body reject the rule changes and first require that the rules undergo a negotiated rulemaking process where a consensus is reached between the PDC, the counties and the public defenders.

As Ada County has previously indicated, the PDC's overall goal is noble and valuable: to improve public defense throughout the state of Idaho and to ensure that every indigent defendants enjoys the safeguards of a constitutional right to counsel. Ada County shares that goal, and is happy to continue working with the PDC to modify the rules to ensure that they meet that goal within the bounds of the Idaho Code.

Sincerely,

ADA COUNTY BOARD OF COMMISSIONERS

Rod Beck, Commissioner

Kyan Davidson, Commissioner

Kendra Kenyon, Commissioner